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The decision of the United States Supreme Court in Barnitz v. Beverly, 16 S. C. Rep. 1042, is valuable and timely. Following close upon the decision of the Supreme Court of Montana in State v. Gilliam, to which we called attention in a late issue of this JOURNAL, 42 Cent. L. J. 512, it emphasizes the erroneous conclusion of that court, and also demonstrates, as many believed it would, that the original decision of the question by the Supreme Court of Kansas, in Watkins v. Glenn, 41 Cent. L. J. 68, is correct, and that the change of view on the part of that court, as disclosed by the decision of Beverly v. Barnitz, 42 Cent. L. J. 107, was without legal justification. The decision of the United States Supreme Court, reversing the Supreme Court of Kansas, is to the effect that Laws Kan. 1893 providing, in place of the previous mortgage foreclosure law, under which the purchaser took an absolute title and possession upon the confirmation of the sheriff's sale and issue of the sheriff's deed, that the mortgagor shall have 18 months for redemption, with full right of possession during that time, and forbidding another sale of the same land for any deficiency on the first sale, is unconstitutional as applied to a mortgage executed before its passage. The Kansas court in 1895 had so held in the case of Watkins v. Glenn, in an exceedingly clear opinion by Chief Justice Horton. Thereafter in the case of Beverly v. Barnitz the court filed two opinions, in which, after elaborate reviews of the decisions of the United States Supreme Court, opposite conclusions were reached. The case was twice argued and decided. On the first hearing a majority of that court held, expressing its views in an opinion by Chief Justice Horton, that chapter 109 of the Laws of Kansas of 1893 did not apply to contracts made before its passage, and that, if it did so apply, the law was void as respects prior contracts, because it impaired their obligations. A change in the membership of the court having taken place a rehearing was had; and it was held by a majority of the court, speaking through Chief Justice Martin, that the act in question was applicable and valid in the case of contracts made before and after its passage. Beverly v. Barnitz, 55 Kan. 451, 40 Pac. Rep. 325; *Id.*, 55 Kan. 466, 42 Pac. Rep. 725. It is this last decision which came before and is now reversed by the United States Supreme Court. Mr. Justice Shiras, who wrote the opinion, exhaustively reviewed the authorities, including Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Howard v. Bugbee, 24 How. 461; Brine v. Insurance Co., 96 U. S. 627; Siebert v. Lewis, 122 U. S. 284; Louisiana v. New Orleans, 102 U. S. 203; Insurance Co. v. Cushman, 108 U. S. 51; Morley v. Railroad Co., 146 U. S. 162. This decision is eminently sound and in accord with constitutional principles. Viewing the question from a practicable standpoint the injustice of holding the act in question retroactive and constitutional may be clearly shown. Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises. Under the new law, the mortgagor shall have 18 months from the date of sale within which to redeem, and in the meantime the rents, issues, and profits, except what is necessary to keep up repairs, shall go to the mortgagor or the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest, and costs, but of the amount paid by the purchaser, with interest, costs, and taxes. In other words, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of posssession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrance), but a remainder—an estate subject to the possession, for 18 months, of another person, who is under no obligation to pay rent or to account for profits. Courts, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose to

contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for 18 months.

NOTES OF RECENT DECISIONS.

CRIMINAL LAW AND PROCEDURE—IMPOSITION OF COSTS ON PROSECUTOR—CONSTITUTIONALITY OF STATUTE.—In Lowe v. Kansas, 16 S. C. Rep. 1031, the Supreme Court of the United States decides that Gen. Stat. Kan. 1889, ch. 82, § 326, providing that, when a prosecution has been instituted without probable cause and maliciously, the name of the prosecutor shall be stated in the finding, and he shall be adjudged to pay the costs, and committed to the county jail until they are paid, is not invalid as depriving the prosecutor of his property without due process of law; the statute, as construed by the State court, giving him the right to be heard and to introduce evidence at the trial as to whether he had instituted the prosecution without probable cause, and from malicious motives and that as the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it does not deny him the equal protection of the laws. The court thought that whether the mode of proceeding prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases. Murray v. Hoboken Co., 18 How. 282, 272; Dent v. State of West Virginia, 129 U. S. 114, 124, 9 Sup. Ct. Rep. 231. By the common law, at first, while no costs, *eo nomine*, were awarded to either party, yet a plaintiff who failed to recover in a civil action was amerced *pro falso clamore*. Bac. Abr. "Costs." A; Day v. Woodworth, 13 How. 363, 372. And from early times the legislature and the courts, in England and America, in order to put a check on unjust litigation, have not only, as a general rule, awarded costs to the party prevailing in a civil action but have, not infrequently, required actual payment of costs, or security for their payment from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding. For instance, plaintiffs have been required, by general statute or by special order, to give security for the costs of the action, or to pay the costs of a former suit before suing again for the same cause. Shaw v. Wallace, 2 Dall. 179; Hurst v. Jones, 4 Dall. 353; Henderson v. Griffin, 5 Pet. 151, 159. Third persons allowed to intervene, on condition of giving bond to pay costs, may be compelled to do so by attachment, without remitting the payee to suit upon the bond. Craig v. Leitensdorfer, 127 U. S. 764, 771, 8 Sup. Ct. Rep. 1393. And, in an information to enforce a charitable trust, a relator is required, who may be compelled if the information is not maintained, to pay the costs. Attorney-General v. Smart, 1 Ves. Sr. 72, and note; Attorney-General v. Butler, 123 Mass. 304, 309. English statutes, from long before the American Revolution, authorized costs against informers upon a penal statute, or against private prosecutors of an indictment or information to be awarded by the court, either absolutely or unless the judge before whom the trial was had certified that there was probable cause for the prosecution. St. 18 Eliz. ch. 5; 27 Eliz. ch. 10; 4 W. & M. ch. 18, § 1; 13 Geo. III. ch. 78, § 64; Bac. Abr. "Costs," E; Rex v. Heydon, 1 Wm. Bl. 356, 3 Burrows, 1304; Rex v. Commerell, 4 Maule & S. 203; Reg. v. Steel, 1 Q. B. Div. 482. Mr. Justice Brown dissented from the criticism of the court.

RAILROAD COMPANY—MUNICIPAL AID BONDS—CHANGE OF ROUTE.—It is held by the Supreme Court of Appeals of West Virginia in Ravenswood S. & G. Ry. Co. v. Town of Ravenswood, 24 S. E. Rep. 597, that if at the time a proposition to subscribe to the stock of a proposed railroad is submitted to the voters of a small municipal corporation, the route of such road is located through the corporate limits of such municipality, in the

absence of proof to the contrary, such location will be presumed to be a part of such proposition; and if, after the vote is taken, such location is materially changed to a route entirely beyond the limits of such municipality, the right to demand the issuance of the bonds authorized by such vote will be presumed to have been abandoned, even though the authorities of such road should, by leave, obtain the privilege of running trains over the track of another road in full operation, and extending through such municipality on a different route and in a different direction. Under such circumstances, a *mandamus* will not lie to compel the municipal authorities to issue such bonds. Upon the law involved in the case, the court says:

In the case of Banet v. Railroad Co., 13 Ill. 504, it is held: "A subscriber to railroad stock will be held liable to the payment of his subscription although the legislature may have authorized, and the directors of the company may have adopted, a change of route from the first fixed by-law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration." And in the case of Sprague v. Railroad Co., 19 Ill. 177, in approval of the foregoing decision, it is said: "In determining the question as to how far the original purposes of a corporation may be departed from after subscriptions have been made to its stock without violating the rights of the stockholders individually, we must first consider with what intention and in view of what advantage the law must presume such subscriptions are made. As is clearly manifest from the decision of the case above referred to, the conclusive presumption is that it was with a view to the profits to be derived from the stocks thus subscribed as an investment, and not in reference to any incidental advantages which may accrue to the stockholders by reason of the construction of the improvement, in consequence of any anticipated enhancement of any other property which the stockholders may own, or otherwise." Railroad Co. v. Zimmer, 20 Ill. 654; Railroad Co. v. Earb, 21 Ill. 291; People v. Holden, 82 Ill. 93. These cases (and many others in support thereof might be cited) establish the rule that a subscriber to railroad stock is induced to grant his subscription thereto from the profits and dividends to be derived from the stock, and not from any supposed incidental advantage he may derive from the construction of the road on a peculiar location; and therefore he cannot escape the payment of his subscription because of a change in the location of the road detrimental to his private property. This rule does not apply, however, to the subscriptions of municipal corporations under the laws of this State. They are not permitted to become subscribers to the stock of a railroad without regard to its location, but they are limited to such railroads as are located through, by, or near such corporations, being such railroads as will promote the general prosperity and welfare of the taxpayers of such corporations. It is a well-known fact that subscriptions of stock are no longer made by municipalities to railroad companies through prospect of profit to be derived from the investment, for, while in name they are subscriptions to the stock, they are nothing more than gifts, but that they are made to secure the indirect advantages to be derived from the construction of such railroad by the citizens of such municipality in the enhancement of their property, the increase of the population and taxable subjects and property, and the opportunities for labor and employment furnished. The actual location of the line of the road before the vote for a proposed subscription is had becomes an essential and important factor in securing the assent of the voters, and a material change of such location after such assent is secured is a breach of the condition on which said vote was had, sufficient to vitiate and render it invalid. In the case of Town of Platteville v. Galena & S. W. R. Co., 43 Wis. 43, it was held: "It is competent for a railroad company in submitting to a municipality a proposition for aid to define therein, as a part of the proposition, the line of the proposed road." And, if it does so, it is bound thereby. Such a proposition may be orally submitted, as well as in writing. And where the road has been already located through a town, and a proposition for aid is submitted to the authorities thereof, it must necessarily be presumed that such location was a part of the proposition. The time, terms, and conditions of the issuance of municipal aid bonds depend entirely on the consent of the legal voters. Hodgman v. Railway Co., 20 Minn. 48 (Gil. 36). Such conditions cannot be departed from or changed without the consent of such voters, ascertained in the manner provided by law. State v. County Ct. of Daviess Co., 64 Mo. 30; Chapman v. Railroad Co., 6 Ohio St. 119; Noeson v. Town of Port Washington, 37 Wis. 168, 177.

MUNICIPAL CORPORATIONS—SUPPLIES—DEPOSIT ACCOMPANYING SEALED BID—PENALTY.—In Willson v. Mayor, etc., 34 Atl. Rep. 774, decided by the Court of Appeals of Maryland, sealed proposals for furnishing city supplies were advertised for. The bids provided that "the full name and address of a surety must be written on the proposal, and each proposal must be accompanied by a certified check for $500. * * * If the successful bidders enter into contract, with bond, without delay, their checks will be returned as will those of the unsuccessful bidders." The contract was awarded, but the bidder was unable to obtain a surety, and the contract was let to another. It was held that the deposit was a penalty, and could be enforced only to the extent of the actual loss resulting from a failure to complete the contract. The court said in part:

Whether a sum named in a contract to be paid by a party in default, on its breach, is to be considered liquidated damages, or merely a penalty, is one of the most difficult and perplexing inquiries encountered in the construction of written agreements. The solution of that question, while to some extent controlled by artificial general rules, which are not wholly in harmony with the ordinary canons of construction, depends, in a large measure at least, upon the particular facts and circumstances of each separate case. There are to be found both decisions and *dicta* tha

are conflicting and irreconcilable, but the general principles which are usually invoked, and which are peculiar to contracts of this character, are nowhere seriously disputed or denied. As just compensation for the injury done is the end which the law aims to reach, the intention of the parties at the time the contract was entered into is often, though not always, given weight; and while the language they have used in the instrument, if they declare that the damages shall be liquidated, is a circumstance that may have its influence (Geiger v. Railroad Co., 41 Md. 4), yet even their explicit words will be sometimes disregarded (Hough v. Kugler, 36 Md. 195), and the measure of damages will be restricted to such as the evidence shows have been actually sustained, if the entire agreement, and the peculiar circumstances of the subject-matter of the contract, indicate that the reason and justice of the case require this to be done. Kemble v. Farren, 6 Bing. 141; Foley v. McKeegan, 4 Iowa, 1; Watts v. Sheppard, 2 Ala. 425; Streeper v. Williams, 48 Pa. St. 450; Perkins v. Lyman, 11 Mass. 76; Condon v. Kemper, 47 Kan. 126, 27 Pac. Rep. 829, and 13 Lawy. Rep. Ann. 671, and notes; Chamberlain v. Bagley, 11 N. H. 234; Davies v. Penton, 6 Barn. & C. 216; Fitzpatrick v. Cottingham, 14 Wis. 237; Fisk v Gray, 11 Allen, 132; Green v. Price, 13 Mees. & W. 701. It is equally well settled that a sum, if it be at all reasonable, and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are wholly uncertain, and cannot be ascertained upon an issue of fact. A common instance is the case of agreements between professional men, binding a retiring partner, or an apprentice or clerk, not to interfere with the business of the other. Galsworthy v. Strutt, 1 Exch. 659; Rawlinson v. Clarke, 14 Mees. & W. 187; Mercer v. Irving, El. Bl. & El. 563. But a stipulation to pay a specified sum upon the nonperformance of a contract is regarded as a penalty, rather than as liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation. Shute v. Taylor, 5 Metc. (Mass.) 61; Dimech v. Corlett, 12 Moore, P. C. 199; Crisdee v. Bolton, 3 Car. & P. 240; Chilliner v. Chilliner, 2 Ves. Sr. 528; Coles v. Sims, 5 De Gex, M. & G. 1. And such a stipulation is generally regarded as a penalty, in the absence of a clear indication of a contrary intention by the parties at the time the contract was executed, where the agreement is certain, and the damages for a breach thereof are easily and exactly ascertainable. Burrill v. Daggett, 77 Me. 545, 1 Atl. Rep. 677; Brown v. Bellows, 4 Pick. 179. Finally, the tendency of late years has been to regard the statements of the parties as to liquidated damages in the light of a penalty, unless the contrary intention is unequivocally expressed, so that harsh provisions will be avoided, and compensation alone will be awarded. Gammon v. Howe, 14 Me. 250; Leggett v. Insurance Co., 53 N. Y. 394; Brown v. Bellows, *supra*; 2 Green Ev., §§ 258, 259.

Now, it will be observed that the contract between the appellant and the appellee, evidenced by the bid filed and accepted, has not a word in it descriptive of the $500 deposit as either liquidated damages or a penalty. It is clear, therefore, that the parties themselves have not, by any term or provision of the agreement, declared that the deposit shall be either the one or the other, but have left the question at large; and it is equally clear that there is nothing in the subject-matter of the agreement which imperatively requires that the deposit be characterized as liquidated damages, especially as the decided inclination of the courts, in doubtful cases even, is to treat the stipulated sum as merely a penalty. Indeed, there is no explicit forfeiture of the deposit at all. The contract provides simply that "if the successful bidders enter into contract, with bond, without delay, their checks will be returned;" but it is nowhere expressly declared that a failure to enter into bond shall entitle the city to the whole amount of the deposit, or to any part of it, though it is palpably implied that so much of it as will be a just compensation for any loss that may result to the city from the failure of the bidder to furnish the bond was, in view of the whole subject-matter, designed by the parties to be applied by the city to its own reimbursement. But, beyond this, the exact amount of loss which would result to the city by the failure of a bidder to give the required bond is capable of definite and precise ascertainment. A failure to give the bond is a breach of the contract, and the damages which would result from that breach would be the amount the city paid, if anything, in excess of the amount of the unexecuted bid, and also the expenses of a readvertising for new bids. These elements of damage are neither uncertain, nor difficult of ascertainment by a jury, and this fact is one of the recognized tests resorted to for distinguishing between liquidated damages and a penalty. Geiger v. Railroad Co., *supra*. Not only, then, is there no provision expressly declaring this deposit to be liquidated damages, but to treat it as such would require the superaddition, by implication, of a distinct term to the contract, which is not permissible, and the reversal of the doctrine that courts lean strongly against upholding a specified sum as liquidated damages where such an interpretation is of doubtful accuracy and leads to manifest injustice. That an interpretation which treats this deposit as liquidated damages would, to say the least, be of doubtful accuracy, cannot be disputed. That it would be unjust, in this particular case, in its results, is scarcely open to discussion. The appellant is conceded to have acted in perfect good faith. The city has not only not lost anything by his failure to give the bond, but it has actually gained thereby a considerable sum; and it would be unconscionable (Cutler v. How, 8 Mass. 257), under these conditions, for it to retain the $500 as stipulated and liquidated damages for a technical breach which has occasioned no appreciable injury. We discover nothing on the face of the contract, nothing in all the surrounding circumstances on the subject-matter, and nothing in the rules of law, which will justify us in holding this deposit to be liquidated damages, unless the remaining proposition to be considered sustains the appellee's contention. That proposition is that where a sum is deposited, either with a third person, or with the other party to the contract, it is invariably treated as liquidated damages; and the cases of Wallis v. Smith, 21 Ch. Div. 250; Hinton v. Sparkes, L. R. 3 C. P. 161, and some others, have been referred to. In Wallis v. Smith the plaintiff entered into a contract with the defendant, who was a builder, to sell him an estate for £70,000, which was to be expended by the defendant in building on the estate. The contract contained numerous provisions, and among other things, that a deposit of £5,000 should be paid by the defendant into the bankers, to the joint account of the plaintiff and defendant, of which £500 was to be paid on the execution of the contract, and the remainder within seven months. If the plaintiff could not make good title, the deposit of £500 was to be returned, and the plaintiff was to pay the defendant £5,000 as liquidated damages. And if the defendant

should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then, and in either event, the deposit of £5,000 should be forfeited; and if it had not been paid, the defendant should forfeit and pay to the plaintiff, by way of liquidated damages, the sum of £5,000, and the agreement should be void, but credit was to be given to the defendant for all moneys actually expended. While it was held that the £5,000 was to be treated as liquidated damages, Sir George Jessel, M. R., described it as "a deposit in part payment of the nominal purchase money." And in Hinton v. Sparkes the covenant was, "If the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited in part of the following damages." These cases, and others to which allusion might be made, relate to a different class of contracts. Where parties contract, as they frequently do by a condition of sale, that the deposit money shall be forfeited if the purchaser fail to carry out his contract, the deposit cannot, nor can any part of it, be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendor was less than the amount of the deposit. In fact, the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is in reality not a pledge, but a payment in part of the purchase money. Wood, Mayne, Dam., § 245; Sugd. Vend., ch. 1, §§ 3, 18. Thus, in Chaude v. Shepard, 122 N. Y. 397, 25 N. E. Rep. 358, it appeared that the defendant leased certain premises to the plaintiff, who deposited with him a sum of money under a provision in the lease that defendant should hold the same as security for the faithful performance by the plaintiff of his covenants in the lease, the same to be applied as payment of rent on the last three months of the term, provided the lease was not sooner terminated by plaintiff's failure to perform, in which last event it was declared that the sum paid should be forfeited, and become the property of the defendant absolutely. Default being made in the payment of one month's rent, plaintiff was dispossessed by the defendant, who refused to pay back any part of the deposit. In an action to recover the same, less the month's rent, it was held that the provision in reference to the deposit was not intended to give it the character of liquidated damages, but rather as a penalty; that the deposit was a security for the performance of plaintiff's covenants. In the opinion of the court it was said: "It is, however, urged by the learned counsel for the defendant that as the money was actually placed in the possession of the defendant, pursuant to the contract, at the time of the execution of the lease, the disposition of it is governed by a different rule than that which would have been applicable if the claim to it had been founded upon the executory agreement of the plaintiff to pay it. That would have been so if the money had been paid upon the contract by way of partial performance by the plaintiff." Reference is then made to Page v. McDonnell, 55 N. Y. 299; Lawrence v. Miller, 86 N. Y. 131; Havens v. Patterson, 43 N. Y. 218. And so, where there was a sale, and a deposit was made under a covenant providing that, "if the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be forfeited as liquidated damages to be retained by the vendors," it was held that this applied only to a breach of the conditions of sale, and not to a breach of the entire contract to buy. Icely v. Grew, 6 Nev. & Man. 467; Essex v. Daniell, L. R. 10 C. P. 538. It is stated with great clearness and accuracy by Mr. Brantly, in his admirable work on the Law of Contract (page 192), that "when it is provided that the sum deposited in part performance of the contract is to be forfeited upon failure of the party to complete it, such sum, if not excessive, is liquidated damages." Conversely, if the deposit be not made in part performance of the contract, but be collateral to the contract, and a mere guaranty that its provisions will be observed, and if the making of the deposit is not a part of the thing to be done under or in execution of the contract, but is required simply and solely as a condition precedent to entering into the contract, which distinctly relates to something else, then, obviously, such a deposit would not be treated as liquidated damages merely because it is a deposit, but would be either liquidated damages, or a penalty, as the rules applicable to such a question might cause the court to determine.

We are not prepared to expand the doctrine relating to deposits made on the purchase of land by applying it to contracts of the character now before us. The deposit in the case at bar, when made, was not part of a sum ultimately payable, under the contract, to the city by the appellant, nor was it set apart, either in express terms or impliedly, to meet an obligation arising out of a purchase; but it was designed to serve precisely the same purpose that a guaranty or other indemnity would have done—to save the city harmless from any actual loss which might arise or grow out of a failure on the part of a bidder to furnish a bond conditioned for the performance of his accepted proposal. It would introduce a sweeping departure from established principles to hold, as an unbending rule applicable alike to all contracts, no matter what their nature or subject, that a deposit made to secure their due performance must invariably be treated as liquidated damages, and never as a penalty. Such a rule would, in its application, ignore or arbitrarily override all other principles of interpretation, and would force courts to regard as liquidated damages sums which obviously would not, according to the canons of construction to which we have alluded, ordinarily be so considered. If the contract now before us falls within the decision in Wallis v. Smith and Hinton v. Sparkes, there is no reason for excluding any other contract from the operation of the same doctrine. Then, no matter how apparent it might be, in a given case, that the parties intended the deposit to be a penalty, and no matter how obvious it might be that the subject-matter of the agreement, the surrounding circumstances attending its execution, and the rules of law applicable to its construction, did not require or permit that the deposit should be treated as liquidated damages, still the mere naked fact that a deposit had been made or exacted would, of itself, without more, convert what would otherwise undeniably be a penalty into stipulated damages. We see no reason for giving to a deposit such a far-reaching effect as that, and, without pausing at this place to review the other cases cited at the argument, we hold that the doctrine of Wallis v. Smith and Hinton v. Sparkes, with which we fully concur, has, and, in the nature of things can have, no application to the contract now before us.

THE VENDOR'S LIEN — CRITICISM OF THE DOCTRINE.

The doctrines that obtain in England and many of the American States with respect to the

vendor's equitable lien present some of the most interesting anomalies, and some of the most striking contradictions and conflicts of judicial decision to be found anywhere in the law. This lien appears to have had its origin in the civil law, under which it was applicable also to personalty;[1] and by the law of Louisiana, which is derived from that system, it yet attaches to a sale of movables,[2] but elsewhere in this country, as in England, it is confined to realty alone.[3] Manifestly the claim of the vendor of personalty to a preference right to hold the specific property liable for the debt contracted for it, whenever it can still be reached, is as equitable as that of him who sells realty, and one of the objectionable features of the lien as it obtains here is the injustice which gives it this partial application. Its adoption by the courts of England, in part only, was doubtless due in a large measure to the higher consideration which was there accorded to realty, and its greater importance and value over personal property. Feudalism had long inculcated the idea that a divinity hedged about land such as pertained not to other property; and as late as the time of Geo. II. it was the law of Great Britain that lands in the hands of the heir were not liable for the general or simple contract debts of the ancestor, and therefore he who had sold lands to the decedent on credit, if the personal property of the estate proved insufficient, was remediless. It was considered an original and natural equity that the creditor, whose debt was the price of the land, should, by virtue of that consideration, be allowed to charge the land upon a failure of the personal assets;[4] and it was deemed so flagrantly unjust that one should enjoy lands which had not been paid for, that on application to equity for relief, the chancellors contrived the adoption of the vendor's lien to meet that situation.[5]

In Dunton v. Outhouse, 64 Mich. 425, the doctrine of the vendor's lien is thus declared by Justice Champlin: "The vendor of land who has taken no security, although he has made an absolute deed and acknowledged the receipt of the purchase price, yet retains an equitable lien for the purchase money, unless there be an express or implied waiver and discharge of it, which will be enforced in equity against the vendee, volunteers, and all others claiming under him with notice; that is, against all persons except *bona fide* purchasers without notice." This is substantially the statement of the doctrine as given by Lord Eldon in Macreth v. Symmons, 15 Ves. 329, the earliest case in which the doctrine is fully discussed, and the rule declared to be established by virtue of the prior decisions.[6] Having become once established, it was continued from force of precedent after the condition of the law that brought about its recognition had passed away and the reason for it had ceased to exist.[7] The lien has been accounted for on different grounds that are equally untenable. In Pollexfen v. Moore, 3 Atkins, 272, Lord Hardwicke puts it on the ground that "the vendee was, from the time of the agreement or contract of sale, a trustee as to the purchase price for the vendor;" but this theory,

[1] 4 Kent's Com. 152, 153; 2 Story Eq. 642; Macreth v. Symmons, 15 Ves. 329. Mr. Pomeroy designates the lien of one who has only agreed to convey by some form of land contract as the vendor's lien, and that of one who has conveyed as the grantor's lien. This distinction as to nomenclature may be well taken, but as the term "vendor's lien" is the one generally, and almost exclusively, used, it is in this article applied to the latter class of cases, and whether the lien be implied only, or expressly stipulated for in the deed.

[2] Fenner, J., in Winder v. Shelly, 36 La. Ann. 182, on the proposition that the vendor's lien on the movables sold (certain mules) was extinguished by their conversion into immovables by destination—*i. e.*, by being placed on a plantation—says that "certain French authors are quoted in support of the proposition, but others are of a contrary opinion. The court adopts the view of Troplong, to the effect that the purchaser of such movables as mules, agricultural implements, etc., cannot affect the rights of the vendor thereof by impressing upon them the purely metaphysical quality of immovables." It would thus appear that the vendor's lien, itself purely metaphysical, cannot be countervailed by other metaphysical considerations respecting the destination of mules, though they become immovable. The Code of Louisiana now requires public inscription of the lien, both on movables and immovables. Civil Code (1870), arts. 3249, 3250, 3273, 3274.

[3] Adam's Eq. 127; Sykes v. Betts, 87 Ala. 542; Alexander v. Hooks, 84 Ala. 605; Lanier v. Bell, 81 N. C. 337.

[4] 3 Pom. Eq. Jur. § 1250. "The general doctrine relating to what is understood as the vendor's lien upon realty, rests on the postulate that it is not equitable for one to absorb another's wealth without recompense; and, therefore, as between grantor and grantee, the court will intend that the purchased estate was held for the unpaid purchase money." Donovan v. Donovan, 85 Mich. 63, 66, quoting from Hiscock v. Norton, 42 Mich. 325. It would seem to be as inequitable for one to absorb another's cattle without recompense as to absorb his land.

[5] 1 White & T. Lead. Cas. in Eq. (4th Am. ed.) 500.

[6] See the definition of Lord Eldon as quoted in 3 Pom. Eq. Jur., § 1249, n. 3.

[7] Stats. 5 Geo. II. (1732), ch. 7, § 4.

it has been justly said, would as logically convert the non-performance of every promise made in consideration of a sale of property into a breach of trust, and attach the trust to the property as well as to the price of its sale.[8] It is most commonly said to arise from a natural equity,[9] but this proposition will be seen upon examination to be unfounded in principle. It is the unquestionable right of a vendor, as a part of his contract of sale, to retain if he chooses a lien upon the property to secure his debt; but where this is not done, and he voluntarily places himself in the attitude of a general creditor, the contention that his debt has any intrinsic superiority or is entitled to any precedence over other debts, because it is for land and the land still exists, has no merit whatever. Land is not more essential to human existence and welfare than water or food and raiment, nor is a town lot a thing of greater intrinsic excellence than education or a library, nor is the farmer under a higher moral obligation to the man who sells him land than to him who furnishes a horse and plow with which to cultivate it; and no just distinction can be made in the legal obligation of debts on such ground. If debts should be ranked according to their moral qualities, certainly the highest ground of distinction that could be taken, it is not seen that a debt for land would gain any precedence on that account. Since land is indestructible, while personal property may often be consumed, or may of necessity perish and pass away, the vendor of land, in having a better opportunity of securing his debt by contract lien, enjoys in this respect an advantage over other vendors existing in the nature of the case; and it is the vendor of personalty whose more defenseless situation should invoke the special aid of a court of equity, which in this matter, however, gives to him who hath, and withholds from him that hath not, even as saith the scriptures. It may be further noticed here, that if the special interposition of courts of equity is warranted merely on the ground that it is unconscionable that one should enjoy property for which he has not paid, this would authorize them to also interfere and set aside the statutes of limitations and of exemptions in every case where a just debt is extinguished by the bar of the one or defeated by virtue of the others, since it can make no sort of difference in principle, as affecting the seller's right to recover from the purchaser a *quid pro quo* in some form, that the property of which the latter has had the full benefit may or may not continue to exist in the vendee or his assigns with notice, or in any form whatsoever. To the reflecting mind, the injustice of non-payment is no less flagrant merely because the buyer may have resold the thing bought and invested the proceeds in other property, or may have consumed it, and thus in some measure placed the wrong, like the errors of the doctor that are hidden away in the graveyards, out of mind because out of the actual, physical sight. It has been judicially declared, even in a State where the lien is enforced, that its existence is determined by no well settled rules, and is usually dependent upon the facts of the particular cases, and the questions arising therefrom, such as whether a case of natural equity is shown, and if so, whether it should not yield to superior equities in some other person; whether the party claiming the lien has not waived it, or intended that it should be postponed to some other equity, or by acts of commission or by omission or laches has not lost the right to enforce it.[10] When the courts make distinctions where no difference in principle exists, it is not strange that the result should be a confusion and conflict such as the adjudicated cases on this subject present; a conflict not only as between decisions of the different States, but often a conflict between those of the same State such as no judicial ingenuity can reconcile.[11] It is well said by one of our most eminent writers on equity jurisprudence, that no other doctrine of equity has occasioned such diversity and discord among the American courts; a discord so great that is practically impossible to formulate any general rule that would represent the doctrine as established throughout the whole country. The decisions of the court are conflicting upon nearly every question that has arisen as to the operation of the lien, its waiver or dis-

[8] Ahrend v. Odiorne, 118 Mass. 261.

[9] Senter v. Lambeth, 59 Tex. 259; Gordon v. Rixley, 76 Va. 694; Blackburn v. Gregson, 1 Cox Ch. 90, 100; Warren v. Fenn, 28 Barb. 333.

[10] Fisk v. Potter, 2 Abb. App. (N. Y.) 138.

[11] 2 Jones on Liens, §§ 1061 *et seq.*

charge, the parties against whom it avails, and the parties in whose favor it exists.[12]

The reception of the doctrine in America has been far from uniform. The federal courts have refused to recognize the implied lien, except in affirmance of the local law of the State wherein the particular land in controversy was situate;[13] and Chief Justice Marshall, in Bailey v. Greenleaf, 7 Wheat. 46, declares it inconsistent with the principles of equity and with the spirit of our laws that such a lien should be set up in a court of chancery to the exclusion of *bona fide* creditors. The courts of a number of the States, including those of Pennsylvania, Massachusetts, Maine, New Hampshire, North Carolina, South Carolina, Nebraska and Kansas, have never recognized the doctrine of the implied vendor's lien, but have rejected it from the beginning as inequitable, unsuited to the usages of this country, not in harmony with our laws of real property, unnecessary for the protection of the just rights of creditors, and as introducing an unwarranted exception to the statute of frauds.[14] They refuse to make by implication a contract for a vendor of realty which he has not chosen to make for himself, and which the law does not make for other vendors, and they declare that in a mere contest of equities the vendor's lien is entitled to no preference whatever.[15] "In England," says Chancellor Rutledge, "land was not liable for general debts in the hands of the heir, his rights being specially favored and guarded, but since in this country real and personal estate is in the hands of the heir equally liable for debts, it would be absurd to talk of the creditor having an equitable lien on the land;" and he declares that no such lien had been recognized in the courts of South Carolina for sixty years then past.[16] "Some of the courts," says Chief Justice Crozier, in Simpson v. Mundee, 3 Kan. 182, "regard the lien as a resulting trust, others as an equitable mortgage, and others still as a compound of both. Very manifestly it has none of the attributes of either. It does not arise out of the contract of the parties, nor does it result from the operation of law. It is the mere creature of equity, breathed into existence independently of the original intention of the parties, and entirely without their aid. It is said that this impalpable entity, this protean quality, this ethereal essence which no man can graphically describe, and of which but few have anything like a clear conception, is a part of the law of this State which this court is bound to enforce; that we adopted it from the mother country; that it has been woven into the web of our legal polity, and is ineradicable except by action of the legislature." Such, however, he declares is not the melancholy fact.

"If any third person," says Chief Justice Gray, in Ahrend v. Odiorne, 118 Mass. 261, "has acquired rights in the land conveyed, there is no reason why equity, any more than the common law, should interfere to defeat them. It is worthy of note that the doctrine is condemned without exception by the leading writers on elementary law and equity jurisprudence;[17] that the lien is criticised and deplored by many of the courts that feel constrained by force of precedent to sustain it;[18] and that in the earliest case in which the rule is declared to be fully established Lord Eldon takes occasion, doubting its soundness, to express regret that it has been adopted, declaring that "it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of the court in what cases it would or would not exist."[19] Certainly it is not usual that apologies are made for the birth or christening of a child that is lawfully and properly begotten into the world. The courts imply the lien on the assumption that the parties in

[12] 3 Pom. Eq. Jur., § 1251.

[13] Cordova v. Hood, 17 Wall. 1; Bayley v. Greenleaf, 7 Wheat. 46; Brown v. Gilman, 4 Wheat. 255.

[14] Heister v. Green, 48 Pa. St. 96; Ahrend v. Odiorne, *supra*; Philbrook v. Delano, 29 Me. 410; Edminster v. Higgins, 6 Neb. 265; Arlin v. Brown, 44 N. H. 102. And see Chapman v. Beardsley, 31 Conn. 115.

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all cases intend to reserve it where they do not by express act evince the contrary intention; but this implication, says Chief Justice Gibson, of Pennsylvania, "is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass."[20] "Were it held to be a part of our law," says the Kansas court, "the great majority would not understand it, and but few could; and it would introduce into our legal polity an element of discord." The truth of this can easily be verified by reference to the decisions on the subject. Thus, the lien is held by an almost equal weight of authority to be assignable[21] and to be a personal equity which cannot be assigned.[22] It is declared to be a specific lien, arising out of the contract of sale, and attaching to the property from that date,[23] and it is held to be but a floating equity that does not attach to the property until bill filed to enforce it.[24] It is extinguished by limitation where the debt is barred, and it is not affected by such extinguishment of the debt;[25] a mortgage back by the grantor destroys it,[26] and such mortgage gives it only additional strength;[27] it will prevail against the lien of a judgment creditor, and it will not so prevail;[28] it is based purely upon the intention of the parties,[29] and it exists entirely independent of such intention.[30] These instances will suffice to illustrate the nature and extent of the conflict upon this subject. The rule that when the purchase money debt is barred by limitation the implied vendor's lien is also extinguished, prevails in the larger number of the States, including Texas, but the courts of this commonwealth at an early day successfully inaugurated in favor of the vendor of land whose debt is secured by a lien reserved in the deed, or by purchase money mortgage, what is in practical effect an exemption from the statutes of limitation, and this by a judicial construction fully as ingenious and far-fetched as the original one, which out of airy nothing constructed the implied lien and gave it a local habitation and a name. In one of the early cases the debt due for the land was barred by the statute, and the court, revolting at the injustice of giving the vendee a judgment for land which he had not paid for, and which he refused to pay for by pleading limitation against the debt, declared that such a judgment would involve consequences too monstrous to be tolerated, and sanctioned by no principles of law or justice.[31] So, it was deter-

[20] Kauffelt v. Bower, 7 Serg. & Rawl. 64.

[21] White v. Downs, 40 Tex. 226, 232; Dalton v. Rainey, 75 Tex. 516; Levy v. Wilkinson, 57 Ala. 259; Honore v. Blakewell, 6 B. Mon. 67.

[22] Zwingle v. Wilkinson, 94 Tenn. 246; Dayhuff v. Dayhuff, 81 Ill. 499; Rogers v. James, 33 Ark. 777; White v. Williams, 1 Paige, 502; Howard v. Peyton, 34 Minn. 529; Brush v. Kinsley, 14 Ohio, 20; Iglehart v. Armiger, 1 Bland. Chan. 519, 524; Tarlton v. Buckner, 28 Ark. 66; Pillow v. Helm, 67 Tenn. (7 Baxt.) 545. The prevailing rule is that where the deed is absolute in terms and silent as to the lien, the implied lien in favor of the vendor is not assignable; but where the lien is expressly reserved by the terms of the deed, it is in the nature of a mortgage, and will pass by assignment of the debt. Davis v. Hamilton, 50 Miss. 213; Stratton v. Gold, 40 Miss. 768; Markoe v. Andras, 67 Ill. 34; Elder v. Jones, 85 Ill. 384; Dingley v. Bank, 57 Cal. 469; Osborne v. Rogers, 69 Tenn. (1 Lea) 217.

[23] Joiner v. Perkins, 59 Tex. 301; White v. Downs, 40 Tex. 226, 231. This is the general rule.

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[26] Hannah v. Davis, 112 Mo. 599; Winner v. Lippincott, 124 Mo. —, 28 S. W. Rep. 998; Richards v. McPherson, 74 Ind. 158, 162; Gaylord v. Knapp, 15 Hun, 87; Wells v. Harter, 56 Cal. 342.

[27] Dunlap v. Wright, 11 Tex. 597; DeBruhl v. Maas, 54 Tex. 464; DeForest v. Holum, 38 Wis. 516; Armstrong v. Ross, 20 N. J. Eq. 110; Noos v. Ewing, 17 Ohio St. 500.

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mined that when, in connection with the sale, the vendor takes back a purchase money mortgage on the land conveyed, or reserves a lien thereon in the face of the deed, this will suffice to show that the parties do not intend that the title shall pass until payment in full is made; and it was thereupon accordingly held, that although a deed purports in express terms to then and thereby convey the title, yet that under the circumstances just stated it does not do so, and is not to be regarded as an executed conveyance or deed, but merely as an executory contract of sale, the title remaining in the grantor until final payment.[32] Clearly this construction, which changes the character of the instrument, contradicts its terms and converts the reservation of a lien into a reservation of title, carries the vendor's case safely beyond the range of the statute of limitations, and it has been held under this theory that the lapse of twenty-eight years does not destroy his right and title to the land;[33] and since, upon default in payment, he may resume possession or sell and convey the land to another,[34] it furnishes him, in addition to a practical exemption from limitation, a summary and very effective method by which this delinquent land debtor, so specially abhorred by the courts of equity, may speedily be brought to terms or made to fare worse. That the title remains in the grantor after his deed conveying it, is of course a fiction, as pure as the ancient one relating to John Doe and Richard Roe, and it is indulged only in so far as the grantor's interests are concerned. In all other respects, the title is held to have passed,[35] and no other deed is requisite to convey it to the vendee when the purchase money has been all paid.[36] The decisions under this construction, alternately holding, as the nature of the matter may require, that the title is in the grantee, and again that he has not the title but only a mere equity;[37] or that the grantor

appear wherein the case of the vendee in this instance, even though he had recovered judgment for the land, would have been materially different in principle from that of any other vendee who receives the full benefit of another's property, and is permitted to plead limitation against the debt therefor. Had the court thought to have adjudged, as in Maryland, that the vendor's lien being in the nature of an interest in real estate, is not to be held subject to the statute of limitations, excepting the longer ones prescribed for real actions, the injustice of awarding the land to the vendee would have been avoided, and a more consistent rule laid down than this illogical one, which does violence to the well established principles governing the conveyance of real property.

[32] Howards v. Davis, 6 Tex. 174; Browning v. Estes, 3 Tex. 462; Estes v. Browning, 11 Tex. 237; Baker v. Ramey, 27 Tex. 52; Russell v. Kirkbridge, 62 Tex. 455; Baker v. Compton, 52 Tex. 261; Peters v. Clements, 46 Tex. 114, 123; Hamblen v. Foltz, 70 Tex. 133; Burgess v. Millican, 50 Tex. 397, 401; Lanier v. Foust, 81 Tex. 189; Moran v. Wheeler, 87 Tex. 179; Lundy v. Pierson, 67 Tex. 232; Robinson v. Kampman, 5 Tex. Civ. App. 605; Rogers v. Blum, 56 Tex. 1; Roosevelt v. Davis, 49 Tex. 463; Webster v. Mann, 52 Tex. 416; Saunders v. Hartwell, 61 Tex. 679; Hale v. Baker, 60 Tex. 217; Tom v. Wollhoefer, 61 Tex. 277; Caldwell v. Fraim, 32 Tex. 310, 326. That this construction or theory does not prevail elsewhere, see Smith v. Rowland, 13 Kan. 245; Davis v. Hamilton, 50 Miss. 213; Stratton v. Gold, 40 Miss. 768; Elder v. Jones, 85 Ill. 384; Osborne v. Rogers, 69 Tenn. (1 Lea) 217; Gordon v. Rixley, 76 Va. 694; Strong v. Ehle, 86 Mo. 42; Gamble v. Ross, 88 Mo. 315; Dusenbury v. Hurlbert, 59 N. Y. 541; King v. Y. M. C. A., 1 Woods, 386; 1 Jones on Mort., §§ 228-230; 2 Jones on Liens, §§ 1107-1110; 3 Pom. Eq. Jur., §§ 1253, 1257, 1258, and note; Lavigne v. Naramore, 52 Vt. 267.

[33] Ruff v. Lind, 75 Tex. 700. The possession of the grantee and his assigns cannot be adverse to the grantor: Roosevelt v. Davis, 49 Tex. 463; Railway v. Miller, 115 Mo. 158; nor, under the general rule, will laches or stale demand operate against the legal title held to remain in the grantor, or against the trust which the courts create in his favor. Harris v. Catlin, 53 Tex. 1; 1 Pom. Eq. Jur., §§ 418, 419; 2 Perry on Trusts, 850, 860.

[34] Crafts v. Daugherty, 69 Tex. 477; White v. Cole, 88 Tex. , 29 S. W. Rep. 759 and 1148; Burgess v. Millican, 50 Tex. 397. In Tom v. Wollhoefer, 61 Tex. 277, it is said that the vendee when sued for land, may tender the unpaid purchase money, no matter how long since the default occurred, and save the forfeiture; but in Kennedy v. Embry, 74 Tex. 387, and Bentley v. Evans, 9 Tex. Civ. App. , 29 S. W. Rep. 497, the tenders were held unavailing.

[35] Dibrell v. Smith, 49 Tex. 474, 480; Bailey v. Tindall, 59 Tex. 540; Russell v. Kirkbridge, 62 Tex. 455. The grantor having parted with the title, the land is not subject to an execution against him. Willis v. Sommerville, 3 Tex. Civ. App. 509. The legal title is in the grantor, and descends to his heirs. Harris v. Catlin, 52 Tex. 1; Burgess v. Millican, 50 Tex. 397.

[36] Upon payment the title passes *ipso facto*. Russell v. Kirkbridge, 62 Tex. 455. "If the purchase money be paid, the seizin will be regarded as having been in the vendee *ab initio*, or from the date of the purchase." Dunlap v. Wright, 11 Tex. 600. The title in the grantor is held to be extinguished by virtue of the payment; and it was also held to be extinguished by an assignment of the note: McCamley v. Waterhouse, 80 Tex. 341, 343; Moore v. Glass, 6 Tex. Civ. App. 368; but these latter cases are in effect overruled in White v. Cole, 88 Tex. , 29 S. W. Rep. 759.

[37] The interest of the grantee is such a purely equitable one that it may be sufficiently extinguished by his surrender of the deed in satisfaction of purchase money, and its destruction by agreement, even though the land was his homestead, and his wife did not join in such extinguishment. Cadwallader v. Lovece, 9 Tex. Civ. App. , 29 S. W. Rep. 666. It is not necessary for the wife to join in a written reconveyance to the unpaid grantor. Oury v. Sanders,

has conveyed the title, and again, that it remains in him—have served to add much, at least in the one jurisdiction mentioned, to the confusion which seems to attach to every feature of the vendor's lien. The novel construction is now followed solely upon the principle of *stare decisis*, and because it affords a rule of property which the courts, in view of the powers and duties of the legislative branch of government, do not feel at liberty to change.[38]

In quite a number of States whose courts adopted the equity implied lien, it has now been abolished and the doctrine expelled by legislative enactment;[39] but the tenacity with which the judicial tribunals have adhered to it where it has been recognized, is somewhat remarkable when it is considered that the lien is a court-created one in whole and in its every feature. The doctrine seems to possess, when long looked upon, an allurement as fascinating as the serpent's eye, or those charms of vice which at first we loathe, then pity, then embrace. The Tennessee cases, however, present a noteworthy exception to the almost uniform course which the courts have pursued in this respect. After the doctrine, as recognized and defined in Macreth v. Symmons, had been accepted and followed in that State for more than half a century, the court revolted against continuing to subordinate to this suppositious equity every other equity in the calendar excepting only that of a subsequent purchaser for value without notice; and in Green v. Demoss, 10 Humph. 371, decided in 1849, they declare that, "A vendor who has conveyed without reserving an express lien, has no specific and fixed lien upon the property, and acquires none until his bill is filed for the purpose; and if, before this be done, any other creditor secures a fixed or specific lien upon the property, he will prevail over the vendor." Later, in Fain v. Inman, 6 Heisk. 12, they further declare that, "if this floating equity, misnamed in judicial parlance 'the vendor's lien,' be not quite a myth, but a mere capacity to acquire a lien if he chooses, then this same capacity belongs to others who are creditors and have rights just as meritorious as his, and we hold that the simple knowledge on the part of the creditor that the vendor, sleeping on his rights from year to year, may, if he chooses, acquire a lien as the creditor himself is about to do, cannot in a forum of conscience, impair the validity or affect the value of the lien so acquired by the creditor." In Sharp v. Fly, 9 Baxt. 15, the subject was fully reconsidered and these cases adhered to as presenting the more just and equitable rule; the court declaring that "the whole doctrine of the vendor's lien was established by judicial legislation, and that, as it is the creature of a court of equity, it may properly be modified by the same power that created it."[40] That the lien yet survives in the majority of the States affords a convincing evidence of the conservatism of our courts, and of a settled disinclination on their part to change laws that have become a rule of property.[41] Its long retention also demon-

77 Tex. 281. The doctrine of the transfer of title by extinguishment is a modern one, but since the rule appears to work both ways, it cannot certainly be a bad one.

[38] The great respect justly entertained for the probity and learning of the court that inaugurated this peculiar rule has doubtless had much influence in its retention. In the large number of decisions on this subject, saving only the scant reasoning in two or three of the earliest cases, no defense of the rule can be found; the later cases merely saying that the rule has been so established. "The principle upon which the rule is based," says Justice Gaines, in Hitzle v. Evans, 74 Tex. 596, 598, "is not at all clear, but the doctrine has been settled by numerous decisions of this court. Such a sale of land is frequently said to be executory, and we think the use of this expression has given rise to some confusion of ideas upon the law of this subject. If executory, we think that such a conveyance can only be so considered in the sense that the grantor's title does not become indefeasible until the purchase money is paid".

[39] Civil Code of La. (1870) arts. 3273, 3274; Code of Ga. (1873) sec. 1997; Code of W. Va. (1870) ch. 75, sec. 1; Gen. Stats. of Vt. (1863) ch. 65, sec. 33. Declared to have been "cut up by the roots" in Virginia, by sec. 1, ch. 119, of the Code of 1849. Roanoke v. Simmons, 20 S. E. Rep. 955; Hobson v. Whitlow, 80 Va. 784. Art. 1940 of the Code of Iowa provides that, "no vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor, or assigns, to enforce the lien." It is held immaterial that the second vendee had notice of the lien. Rotch v. Hussey, 52 Iowa, 694; Prouty v. Clark, 73 Iowa, 55.

[40] In North Carolina the lien was enforced in some of the earlier cases before its final rejection. See Womble v. Battle, 3 Ire. Eq. 182; McKay v. Gilliam, 65 N. C. 130.

[41] For late cases declaring the general principles of the vendor's lien, see Vieno v. Gibson, 85 Tex. 432; Newman v. Moore, 94 Ky. 147; Woodall v. Kelly, 85 Ala. 164; Oglesby v. Bingham, 69 Miss. 795; Bramlette v. Wetlin, 71 Miss. 902; Merrill v. Merrill, 102 Cal.

strates the very large measure of confidence reposed in the courts by the people, else the legislative ax had ere this been everywhere laid to the root of a tree which has borne the apples of discord so abundantly, but has proved so unfruitful of any product which an enlightened judgment can commend.[42]

Fort Worth, Tex. B. R. WEBB.

317; Richards v. McPherson, 74 Ind. 158; Barlow v. Fire Ins. Co., 77 Mich. 546; Ellis v. Harriman, 90 N. Y. 466; Hobson v. Whitlow, 80 Va. 784; Zwingle v. Wilkerson, 94 Tenn. 246; Trust Co. v. Smith, 94 Tenn. 513; Pullen v. Ward, 60 Ark. 90; Strong v. Ehle, 86 Mich. 42; Hill v. McLean, 78 Tenn. (10 Lea) 113; Marchand v. Frenson, 105 U. S. 423; Smith v. Lee, 82 Tex. 124.

[42] For cases involving questions as to waiver of the lien, see Donavan v. Donavan, 85 Mich. 63; Bank v. Filer, 83 Mich. 496; Richards v. McPherson, 74 Ind. 158: Hammet v. Stricklin, 99 Ala. 612; Chapman v. Peebles, 84 Ala. 283; Henderson v. Samuels (Tex. Civ. App.), 25 S. W. Rep. 470; Foster v. Powers, 64 Tex. 247; Seeligson v. Mitcham, 79 Tex. 571; Ellis v. Singletary, 45 Tex. 27; Christy v. McKee, 94 Mo. 241. That dower does not attach as against purchase money is the general rule, not only as against the implied lien, but also as against the express lien reserved in the deed. Hunt v. Dulaney, 87 Va. 444; Kaifer v. Lambeck, 55 Iowa, 244; Martin v. Smith, 25 W. Va. 580; Roush v. Miller. 39 W. Va. 638, 20 S. E. Rep. 663; Bailey v. Winn, 101 Mo. 649; Boyd v. Martin, 9 Heisk. 382; Stow v. Mifft, 15 Johns. 458.

CONVEYANCE OF HOMESTEAD — VALIDITY— ACKNOWLEDGMENT—NOTARY — DISQUALIFICATION.

HAVEMEYER v. DAHN.

Supreme Court of Nebraska, May 20, 1896.

A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void. An attorney who is a notary public, is not disqualified from taking an acknowledgment of a mortgage made to his client merely because he holds for collection the claim secured by such mortgage; it not appearing that the attorney had any beneficial interest in having the mortgage made, nor that the amount of his compensation in any manner depended upon such mortgage being made.

RAGAN, C.: John C. Havemeyer brought this suit in equity to the district court of Douglas county against Marcus Dahn and Barbara Dahn, his wife, to foreclose a real estate mortgage. A corporation known as the O. F. Davis Company and a copartnership known as Storz & Iler were also made defendants to the action. The latter two filed cross petitions by which they also sought to foreclose mortgages held by them upon the real estate of Dahn. By the decree of the district court Havemeyer and the O. F. Davis Company were given liens upon the real estate as prayed for in their petition and cross petition; but the district court denied the prayer of the cross petition of Storz & Iler, and dismissed the same, and from this decree they have appealed.

It appears from the special findings of the district court that one Kopald was indebted to Storz & Iler, and as an evidence of this indebtedness he executed to them his note, and this note was signed by the appellee Marcus Dahn, and the note secured by a mortgage upon the homestead of Dahn and wife to Storz & Iler. The notary public who took the acknowledgment of this mortgage was an attorney-at-law, and the attorney and agent of Storz & Iler for the purpose of collecting the debt owing to them from Kopald, and procured Dahn and his wife, as they alleged, by fraud and false representations to execute the mortgage. The learned district court was of opinion that, because the notary public who took this acknowledgment was the agent and attorney of the mortgagee, he was therefore disqualified to take the acknowledgment, and the mortgage, being upon a homestead, was void. In Horbach v. Tyrrell (handed down at this sitting of the court), 67 N. W. Rep. 485, we decided that a notary public was not disqualified from taking an acknowledgment of a mortgage made to a corporation of which he was secretary and treasurer; it not appearing that he was a stockholder in such corporation, or otherwise beneficially interested in having the conveyance made. In the case at bar it is not found that the notary and attorney who took the acknowledgment of Dahn and his wife had any beneficial interest in having the mortgage made. It is true that he was agent and attorney for Storz & Iler, but it does not appear that the amount of his compensation depended upon his procuring this mortgage. Following Horback v. Tyrrell the decree appealed from is reversed and the cause remanded to the district court for further proceedings. Reversed and remanded.

NOTE.—As will be seen the court, in the principal case, follow Horbach v. Tyrrell, decided at the same term, wherein it was held that only a pecuniary interest in a corporation mortgagee could disqualify one of its officers to act as a notary public in taking the acknowledgment which gives validity to the incumbrance of a homestead. The following cases were reviewed by the court in that case in order to determine what relationship and what interest disqualifies an officer from taking an acknowledgment, viz: Haumers v. Dale, 61 Ill. 307, where it was held that acknowledgment of a mortgage taken before a justice of the peace, who was also the mortgagee, is void as to third parties, notwithstanding the fact that he is the only justice in the township qualified to take acknowledgments. It Brereton v. Bennett, 25 Pac. Rep. 310, the Supreme Court of Colorado held: "The fact that the officer taking the acknowledgment of a chattel mortgage was the partner of the mortgagee, and negotiated the loan secured by the mortgage, does not render the mortgage fraudulent and void as to other mortgage creditors, when it is not shown that he was a party in interest to either the lien or the note." In Stevenson v. Brasher, 90 Ky. 23, 13 S. W. Rep. 242, the Court of Appeals of Kentucky held that, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, the clerk may take the acknowledgment of a deed in which he

is grantee. Chapter 37, § 2, of the Revised Code of North Carolina, permits a deputy clerk to take the probate of a deed. In Piland v. Taylor, 113 N. C. 1, 18 S. E. Rep. 70, it was held that the fact that the clerk was grantee did not invalidate the probate taken by the deputy. The statutes of Michigan provide that a judicial sale shall be made by the sheriff or undersheriff, and the deed executed by the officer making the sale. In Cook v. Foster, 96 Mich. 610, 55 N. W. Rep. 1019, the supreme court of that State, in construing this statute, held that a deed executed by an undersheriff might be acknowledged by the sheriff, he being a notary public. In Ewing v. Vannewitz, 8 Mo. App. 602, Append., it was held that the acknowledgment of a deed of foreclosure made by a sheriff as trustee under a deed of trust may be taken by a notary who is also deputy sheriff. In Bank v. Conway, 1 Hughes (U. S.), 37, was held that "a notary, who was one of the beneficiaries under a deed of trust might take the grantor's acknowledgment." In Withers v. Baird, 7 Watts, 227, it was held that an officer who is bound to make title through third persons is so far interested in the conveyance as to be disqualified to take the acknowledgment of the wife of the grantor. In Sample v. Irwin, 45 Tex. 567, it was held that a notary who identifies himself with the transaction by placing his name on the face of a deed of trust as the avowed agent of one of the parties cannot acknowledge the instrument. In Nichols v. Hampton, 46 Ga. 253, it was held that a notary, who is also attorney for the mortgagor, cannot take his client's acknowledgment of the mortgage. But in Bierer v. Fretz, 32 Kan. 330, 4 Pac. Rep. 284, it was held that an acknowledgment of a mortgagor was good, although taken by an attorney for the mortgagee. In Penn v. Garvin, 56 Ark. 511, 20 S. W. Rep. 410, it was held that a notary who acted as agent of a mortgagor in obtaining the loan secured by the mortgage is not so interested as to be disqualified to take the acknowledgment of the mortgage. In Kutch v. Holley, 77 Tex. 220, 14 S. W. Rep. 32, it was held that a married woman's acknowledgment taken by a notary who was the attorney of her husband, but not beneficially interested in the deed, is valid. In Bank v. Radke, 87 Iowa, 363, 54 N. W. Rep. 435, it was held that the acknowledgment of a chattel mortgage made to a partnership before a notary who is one of the partners is void as to third parties without actual notice. In Long v. Crews, 113 N. C. 256, 18 S. E. Rep. 499, it was held that the acknowledgment of a trust deed before a notary who is a preferred creditor therein is a nullity. In Lynch v. Livingston, 6 N. Y. 422, it was held that a commissioner of deeds may take the acknowledgment of a deed, although so related to the makers as to be disqualified to act as judge or juror in a trial where they are parties. In Paper Co. v. O'Dougherty, 81 N. Y. 474, it was held that a justice of the peace may take the acknowledgment of a deed in which his father is grantor and his wife grantee. In Jones v. Porter, 59 Miss. 628, it was held that, if the officer is beneficially interested, his taking the acknowledgment of a relative would be void on that ground, and that the acknowledgment of a deed before the husband of the grantee therein was void. In Kimball v. Johnson, 14 Wis. 734, it was held that "the acknowledgment of a mortgage made to a married woman is not invalid because taken before the husband of the mortgagee, who was a justice of the peace." In Bank v. Roberts, 9 Mont. 323, 23 Pac. Rep. 718, it was held that a notary who is the attorney and nephew of the party to the deed is not so interested as to be disqualified to take the acknowledgment of the deed. In Sawyer v. Cox, 63 Ill. 130, it was held that "an officer of a corporation, whose duty it is to countersign and register its deeds, is not thereby disqualified from taking acknowledgment thereof as a notary his signature not being necessary to the validity of the instrument. The dissenting judge here claims that the above cases are irreconcilably at conflict as to what particular relationship to the parties or subject-matter should be held to disqualify a notary public. He distinguishes a few of them and cites a number of additional cases which do not seem to shed much light upon the question presented. Indeed the protest of the dissenting judge seems to be upon the ground that in the opinion of the court "there has been no attempt made to formulate a general rule as to what disability on the part of the notary public will vitiate his certificate of acknowledgment, though it is intimated that peculiar facts and circumstances may accomplish that result. In this situation there are all the disadvantages which attend upon the possible effects of an unsettled rule of law.

CORRESPONDENCE.

VALIDITY OF ACT EXTENDING TIME FOR MORTGAGE REDEMPTION.

To the Editor of the Central Law Journal:

I notice in your JOURNAL of June 19th, page 512, under your "Notes of Recent Decisions," a reference to the decision of the Supreme Court of Montana, in State v. Gilliam, 44 Pac. Rep. 394, deciding that the act of Montana of July 1st, 1895, extending the time of redemption of premises sold on mortgage, merely operates upon the remedy, and does not impair the obligation of contracts, and thereupon you cite certain decisions of the United States Supreme Court, alleging that they uphold the Montana case. I desire to call your attention to the late decision in Barnitz v. Beverly, vol. 16, Supreme Court Rep. 1042, reversing the last decision of the Supreme Court of Kansas in Beverly v. Barnitz, 55 Kan. 466, and deciding the law to be as declared by the Supreme Court of Kansas in its former decision, 55 Kan. 451.

ALBERT H. HORTON.

To the Editor of the Central Law Journal:

Under title of constitutional law, mortgage, extending time for redemption, you refer to the case of State v. Gilliam, considered by the Supreme Court of Montana, wherein they decided that extending the time for redemption of property sold on mortgage simply operates upon the remedy and does not impair the obligation of contracts within federal inhibition, and you state that this decision follows Beverly v. Barnitz, 42 Pac. Rep. 441, and another case, and also that these decisions are upheld by the United States Supreme Court in cases mentioned by you which includes Bronson v. Kinzie, Ins. Co. v. Cushman, Morley v. Ry. Co., Von Hoffman v. City of Quincy. The Kansas case of Beverly v. Barnitz was reversed by the Supreme Court of the United States, the decision appearing June 8, 1896, and in that decision the court quotes Bronson v. Kinzie supporting its conclusion, as also Von Hoffman v. City of Quincy, and distinguishes Ins. Co. v. Cushman and Morley v. Ry. Co., so if the Montana case is grounded upon similar facts to the Beverly v. Barnitz, it does not derive support from this recent decision.

FRANK WISDOM.

BOOKS RECEIVED.

A Treatise on the Law Pertaining to Corporate Finance, including the Financial Operations and Arrangement of Public and Private Corporations, as Determined by the Courts and Statutes of the United States and England. By William A. Reid, of the New York Bar. In Two Volumes. Albany: H. B. Parsons, Law Publishers. 1896.

Marketable Title to Real Estate, being also a Treatise on the Rights and Remedies of Vendors and Purchasers of Defective Titles, including the Law of Covenants for Title, the Doctrine of Specific Performance, and other Kindred Subjects. By Chapman W. Maupin, of the Washinton, D. C., Bar. New York: Baker, Voorhis & Company. 1896.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

ALABAMA, 9, 14, 15, 32, 40, 54, 94, 96, 137, 141, 158, 168, 186, 219, 220, 223
ARKANSAS....16, 50, 80, 120, 125, 155, 236
CALIFORNIA....36, 117, 118, 191, 231, 243
COLORADO....26, 38, 51
CONNECTICUT....1, 7, 111, 113, 116, 139, 173, 245
INDIANA....45, 77
IOWA....178
KENTUCKY....62, 65, 83, 91, 242
LOUISIANA....23, 39, 70, 78, 112, 150, 179, 187, 193, 246
MARYLAND....12, 124, 247
MASSACHUSETTS....35
MICHIGAN....104, 171, 205
MINNESOTA....18, 53, 175
MISSISSIPPI....85, 170, 238
MISSOURI....24, 82, 121, 145, 225
NEBRASKA, 2, 20, 28, 49, 106, 149, 162, 211, 212, 213, 216, 226
NEVADA....29
NEW JERSEY....151, 153, 166
NEW YORK....22, 56
NORTH CAROLINA, 5, 17, 30, 42, 107, 174, 189, 201, 218, 233, 241, 248
OHIO....6
OREGON....164, 182
PENNSYLVANIA....46, 73, 75, 97, 108, 127, 132, 140, 165, 169
RHODE ISLAND....142, 188, 239
SOUTH CAROLINA....60
SOUTH DAKOTA....227
TENNESSEE, 41, 92, 122, 129, 136, 177, 181, 199, 217, 221, 228, 232, 237
TEXAS, 10, 13, 52, 55, 59, 63, 66, 68, 69, 71, 79, 110, 119, 130, 133, 159, 167, 180, 183, 195, 196, 198, 203, 210, 235
UNITED STATES C. C., 86, 87, 99, 100, 109, 123, 131, 147, 152, 160, 192, 206, 207, 208, 209, 229
U. S. C. C. OF APP....44, 47, 58, 72, 101, 128, 146, 204
U. S. D. C....8
U. S. S. C....33, 57, 98, 230
UTAH....93
VERMONT....67, 81
WASHINGTON....11, 27, 34, 64, 102, 103, 105, 143, 144, 163, 176
WEST VIRGINIA, 19, 37, 48, 61, 74, 76, 88, 89, 114, 138, 154, 156, 157, 184, 185, 190, 194, 197, 215, 222, 224, 234, 249
WISCONSIN, 3, 4, 21, 25, 31, 43, 84, 90, 95, 115, 126, 134, 135, 148, 161, 172, 200, 202, 214, 244
WYOMING....240

1. ACTION — Executors — Where Action may be Brought.—Testator, a resident of New York, bequeathed shares in a corporation, in trust, to plaintiff, a resident of Connecticut; the will being admitted to probate in New York, where two of the executors resided: Held, that plaintiff could not maintain an action in the courts of Connecticut to compel the executors to transfer the stock, even though one of the executors was a resident of that State, and had taken out ancillary letters.—RUSSELL V. HOOKER, Conn., 34 Atl. Rep. 711.

2. ADJOINING HOUSE OWNERS—Partition.—Adjoining lot owners in a city may by grant impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the convenants in such case being a sufficient consideration for the respective grants.—BARR V. LAMASTER, Neb., 66 N. W. Rep. 1110.

3. ADMINISTRATION—Claim—Compensation for Services.—Where plaintiff had worked for intestate for several years during and after his minority, receiving his board and clothing, but with an agreement that, in consideration for his services during her life, intestate would compensate him at her death, on the failure of intestate to make any provision for him, by will or otherwise, he is entitled to recover from her estate the value of his services.—SLATER V. COOK'S ESTATE, Wis., 67 N. W. Rep. 15.

4. ADMINISTRATION — Claims against Decedent's Estates.—Where a son-in-law furnished board, lodging, and services to his father-in-law, on his periodical visits with him during a period of several years, without demanding any compensation, but kept a record of the visits and services, and after his father-in-law's death, being dissatisfied with the share that was left to his wife by his father-in-law, he charged up these items, he could not enforce his claim against the estate.—SCHMIDT'S ESTATE, Wis., 67 N. W. Rep. 37.

5. ADMINISTRATION—Claims—Services of Relatives.—Where a son-in-law and his family and mother-in-law, for 14 years lived together as "one family" at her house, without any agreement for payment for services on either side, and no payment was made except in mutual services, he was not entitled to recover from her estate, on an implied promise, the value of his own and wife's services to her during that time.—CALLAHAN V. WOOD, N. Car., 24 S. E. Rep. 542.

6. ADMINISTRATION—Probate Judge—Jurisdiction.—A probate judge has no jurisdiction, under section 5449, Rev. St., to allow an execution to be issued against the person upon a judgment rendered in the court of common pleas; and his assumption of such jurisdiction gives no validity whatever to his order allowing such execution to be issued.—MILSON V. RENDERING & FERTILIZER CO. V. RONK, Ohio, 43 N. E. Rep. 919.

7. ADMINISTRATION — Sale by Administrator.—A person claiming land under a deed by an administrator, executed by order of the probate court, must show the facts giving the court jurisdiction to order the sale.—DORRANCE V. RAYNSFORD, Conn., 34 Atl Rep. 706.

8. ADMIRALTY JURISDICTION — Lakes and Rivers.—In the act of 1845, purporting to extend the admiralty jurisdiction of the federal courts over the interior lakes and rivers, the provision, now embodied in Rev. St. § 566, saving to the parties a right to demand a jury trial of issues of fact in certain cases, is inoperative to do more than make the verdict advisory, and does not change the powers of the admiralty judge, who is still responsible for the decree rendered.—SANDERSON V. THE CITY OF TOLEDO, U. S. D. C. (Ohio), 73 Fed. Rep. 220.

9. ADVERSE POSSESSION—Right of Pre-emptor.—Since the possession of a pre-emptor, prior to the putting of the land on sale by the general government and his purchase thereof, is merely under claim of a right to purchase, and not under claim of title, is not adverse to one claiming under a grant from the general government which had never put the land on sale.—ALABAMA STATE LAND CO. V. BECK, Ala., 19 South. Rep. 802.

10. ANIMALS—Liability of Owner.—The owner of cattle not known to be breachy, vicious, or diseased may permit them to run at large, and is not liable for trespasses committed by them, except upon lands inclosed with a sufficient fence, under the statute.—CLARENDON LAND INVESTMENT & AGENCY CO. V. MCCLELLAND, Tex., 35 S. W. Rep. 474.

11. APPEAL — Supersedeas Bond.—A judgment, in favor of plaintiff for money due on a note, and for foreclosure of a mortgage securing it, is a judgment "for the recovery of money," within the statute providing that on appeal from such judgment the *supersedeas* bond shall be for double the amount of the judgment, and the court has no authority to fix the amount of such bond.—COMMERCIAL NAT. BANK V. SUPERIOR COURT OF KING COUNTY, Wash., 44 Pac. Rep. 859.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Conventional trustees, claiming under a deed of trust for the benefit of creditors, cannot attack a conveyance by their assignor as in fraud of creditors.—FARMERS' & MECHANICS' NAT. BANK OF FREDERICK V. DE FORD, Md., 34 Atl. Rep. 788.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An instrument called on its face a "deed of trust," executed by an insolvent, conveying his entire stock in trade and fixtures to one of his creditors "to secure the payment" of creditors therein specified, and which authorizes the grantee to sell the property, and pay the specified creditors, and provides that the surplus, if any, shall be returned to the grantor, the instrument then to be void, is not an assignment for benefit of creditors.—SEWARD CONFECTIONARY CO. V. ULLMAN, Tex., 35 S. W. Rep. 469.

14. ATTACHMENT — Appearance.—An appearance by counsel of a non-resident attachment defendant, for the sole purpose of moving a discharge of the levy, and the dissolution of the attachment, does not constitute a general appearance, and service must be made by publication before default and judgment can be entered.—EXCHANGE NAT. BANK OF SPOKANE V. CLEMENT, Ala., 19 South. Rep. 814.

15. ATTACHMENT—Collusive Writ.—A writ of attachment, issued collusively between a creditor and an insolvent debtor, with the view of defendant's suffering a judgment against himself, to hinder and defraud his creditors, is within Code, § 1735, declaring void a "suit commenced" with intent to defraud creditors.—COMER V. HEIDELBACH, Ala., 19 South. Rep. 719.

16. ATTACHMENT—Contract.—An action for breach of contract, though the damages claimed are unliquidated, is nevertheless a demand arising on contract within the meaning of Sand. & H. Dig. § 325, providing that attachment will not be granted on the ground that defendant is a non-resident for any claim other than a debt or demand arising upon contract.—MESSINGER V. DUNHAM, Ark., 35 S. W. Rep. 435.

17. BASTARDY—Appeal by State.—Act 1879, ch. 92, § 2, providing that, in bastardy proceedings, when the issue of paternity is found against the putative father, he shall be fined, etc., for the benefit of the school fund, constitutes bastardy a criminal offense, within the meaning of Code, § 1237, limiting the right of appeal by the State in criminal actions.—STATE V. OSTWALT, N. Car., 24 S. E. Rep. 660.

18. BUILDING AND LOAN ASSOCIATIONS — Exercise of Corporate Rights.—A building and loan association doing business under the provisions of chapter 131, Laws 1891 (sections 2855-2894, Gen. St. 1894), is a corporation having the power to make loans on pledges, and may, in an action by the attorney-general, on behalf of the State, under the provisions of section 5900, Gen. St. 1894, be restrained from exercising any of its corporate rights, whenever it violates the provisions of its acts of incorporation, or any other law binding on it.—STATE V. AMERICAN SAVINGS & LOAN ASS'N, Minn., 67 N. W. Rep. 1.

19. CARRIERS OF PASSENGERS—Contributory Negligence.—It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train when there is standing room inside; and if, by reason of his refusal to do so, and by going onto the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance, by reason of a lurch of the car in rounding a curve, and falls overboard, and is injured, he is guilty of contributory negligence, such as will preclude his recovery for such injury.—FISHER V. WEST VIRGINIA & P. R. CO., W. Va., 24 S. E. Rep. 570.

20. CARRIERS OF PASSENGERS—Contributory Negligence.—Where a passenger knowingly jumps from a moving train, under such circumstances as to render the act obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, it will prevent a recovery for the injuries received therefrom.—CHICAGO, B. & Q. R. CO. V. HYATT, Neb., 67 N. W. Rep. 8.

21. CARRIERS OF PASSENGERS—Exemptions from Liability.—In the absence of legislation by the federal government as to the validity of stipulations by a common carrier for exemption from liability for injuries to passengers, in contracts for interstate carriage, their validity is to be determined by the common law.—DAVIS V. CHICAGO, M. & ST. P. RY. CO., Wis., 67 N. W. Rep. 16.

22. CARRIERS OF PASSENGERS—Negligence—Contributory Negligence.—There was evidence that plaintiff, at the invitation of an employee of the defendant carrier, got upon its cars, which were so crowded as to necessitate his riding upon the platform; that, due to the crowd upon the platform, the carrier was unable to close the gates on the car as required by statute; that the conduct of an employee of the carrier, in striking at a passenger, caused the crowd on the platform to jostle; and that plaintiff, in attempting to retain his position, involuntarily seized the railing behind him, whereby his arm was caught between the railings of the car on which he was riding and the one behind him, and broken: Held, that the evidence was not insufficient, as a matter of law, to show negligence on the part of the carrier.—GRAHAM V. MANHATTAN RY. CO., N. Y., 43 N. E. Rep. 917.

23. CARRIERS OF PASSENGERS—Street Railways—Injuries.—Ordinarily, passengers on street cars are expected to alight with some haste. When, however, a person is infirm, or clumsy, or incumbered with packages or other hindrances, more prudence is required than ordinarily.—BOIKENS V. NEW ORLEANS & C. R. CO., La., 19 South. Rep. 737.

24. CERTIORARI.—The practice in proceedings by *certiorari* is not regulated by statute, but should be made to conform by the courts to the principles and usages of law. A writ of *certiorari* to review the action of a public board calls for an exhibit of the record of that body bearing upon the questions involved, and, if a portion of such record is omitted from the return, the court may properly permit the respondents to supply it by amendment.—STATE V. SPRINGER, Mo., 35 S. W. Rep. 589.

25. CHAMPERTY.—An agreement by an attorney to pay or contribute to the payment of expenses of litigation in which he is interested as a party, does not render the action champertous.—GILBERT-ARNOLD LAND CO. V. CITY OF SUPERIOR, Wis., 67 N. W. Rep. 39.

26. CHATTEL MORTGAGE.—Under Gen. St. 1883, §§ 163, 164, a chattel mortgage which does not bear a certificate showing it to have been properly acknowledged by the mortgagor, is invalid as against third persons and attaching creditors.—EDINGER V. GRACE, Colo., 44 Pac. Rep. 835.

27. CHATTEL MORTGAGE—Acknowledgment and Recording.—Under 1 Hill's Code, § 1648 (making a chattel mortgage void as to creditors of the mortgagor, and as to subsequent purchasers for value and in good faith, unless acknowledged and recorded and accompanied with an affidavit by the mortgagor that it was made in

good faith), one who bought the chattels with knowledge of the existence of the mortgage and its non-payment could not attack it for want of acknowledgment, record and affidavit.—MENDENHALL V. KRATZ, Wash., 44 Pac. Rep. 872.

28. CHATTEL MORTGAGE—Consideration—Record.—It is a good defense to an action in replevin to prove title and right of possession in a third person. A chattel mortgage is good, between the parties thereto and all others except creditors of the mortgagor or subsequent purchasers and mortgagees in good faith, though not filed as required by statute.—FULLER V. BROWNELL, Neb., 67 N. W. Rep. 6.

29. CHATTEL MORTGAGE—Lien.—The mortgagee of personal property does not, in the absence of fraud, lose his lien thereon merely by failing to take possession of the property when the debt falls due.—STREETER V. JOHNSON, Nev., 44 Pac. Rep. 819.

30. CHATTEL MORTGAGES—Possession.—Where plaintiff, on exchanging horses with defendant, gave as boot money a note secured by mortgage on the horse, and took the horse home with him, the fact that defendant allowed him at the time to retain possession of the mortgaged property did not amount to such a stipulation that he should have possession as would defeat defendant's right to retake possession at any time as mortgagee.—HINSON V. SMITH, N. Car., 24 S. E. Rep. 541.

31. CHATTEL MORTGAGES—Redemption.—A provision in a chattel mortgage authorizing the mortgagee, if at any time he deems himself insecure, to seize and sell the property with or without notice at public or private sale, is not a waiver by the mortgagor of the provisions of Sanb. & B. Ann. St. § 2316a, prohibiting the sale of property without the consent of the mortgagor until five days after seizure, and giving the mortgagor the right to redeem during the time.—VREELAND V. WADDELL, Wis., 67 N. W. Rep. 51.

32. CONSTITUTIONAL LAW—General Law — City Licenses.—Act February 18, 1887, as amended, authorizing all towns and cities to enforce any of its provisions for the assessment and collection of taxes which they have by ordinance adopted, but providing that none except certain designated cities shall collect a license tax on any business or occupation upon which the State does not collect a like tax, is not a general law, within Const. art. 4, § 50, prohibiting the general assembly from authorizing any municipal corporation to pass any laws inconsistent with the "general laws" of the State so as to render void a provision in a city charter authorizing it to tax business and occupations.—HOLT V. MAYOR, ETC., OF BIRMINGHAM, Ala., 19 South. Rep. 735.

33. CONSTITUTIONAL LAW — Interstate Commerce—Telegraphic Messages.—A State statute requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith and due diligence, under penalty of $100 in each case (Act Ga. Oct. 22, 1887), is not void, as to messages coming from without the State, as an unwarrantable interference with interstate commerce, in the absence of any legislation by congress on the subject.—WESTERN UNION TEL. CO. V. JAMES, U. S. S. C., 16 S. C. Rep. 934.

34. CONSTITUTIONAL LAW—Landlord and Tenant.—Act March 7, 1891 (Laws 1891, p. 179, ch. 96), by imposing a penalty on a tenant who, after breach of lease and notice to quit, wrongfully continued in possession, did not, as to existing leases, impair the obligation of contracts within the prohibition of the federal and State constitutions.—WOODWARD V. WINEHILL, Wash., 44 Pac. Rep. 860.

35. CONSTITUTIONAL LAW—Notaries Public—Eligibility of Women.—Const. art. 4, of amendments, providing that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed," viz: by and with the advice and consent of the council (Const. pt. 2, ch. 2, art. 9, § 1), does not, when considered in connection with the history and nature of such office, and the usages of this and other States with reference thereto at the time the constitution was adopted, authorize the appointment of women as notaries.—OPINION OF THE JUSTICES, Mass., 43 N. E. Rep. 927.

36. CONSTITUTIONAL LAW—Police Power.—Pen. Code 1895, § 310 1-2, making it a criminal offense for barbers to conduct their business on Sundays or holidays after 12 o'clock M., is not a proper exercise of the police power of the State.—EX PARTE JENTZSCH, Cal., 44 Pac. Rep. 803.

37. CONTRACT—Breach—Damages.—Where a party to a contract notifies the other that he does not intend to abide by or perform it, the other may bring an immediate suit for such damages as he may thereby have sustained, without waiting for the time of performance to expire.—DAVIS V. GRAND RAPIDS SCHOOL FURNITURE CO., W. Va., 24 S. E. Rep. 631.

38. CONTRACT—Consideration.—A mere promise to lend money on a certain date to enable the promisee to pay off a mortgage, there being nothing to support such promise but the promisee's request for the loan, is without consideration and void.—GUTHEIL V. SCHMIDT, Colo., 44 Pac. Rep. 853.

39. CONTRACT — Contemporaneous Contracts—Interpretation.—Two agreements, of contemporaneous date, one of which is signed by creditor and debtor, and the other by the debtor and surety, and each making reference to the other, must be construed together; and, thus construed, what is doubtful in one may be made clear by what is found in the other.—ISADOR BUSH WINE & LIQUOR CO. V. WOLF, La., 19 South. Rep. 765.

40. CONTRACT—Implied Promise to Pay.—One who had, from time to time, furnished railroad ties to a contractor, delivering them on the right of way of the railroad, where they were inspected by the company, and paid for to the contractor, cannot recover from the railroad company for ties so left with others owned by the contractor, and which were inspected and used by the company, and for which it paid the contractor, in the absence of an express contract or notice to the company that the ties were not owned by the contractor; and notice to the inspector, whose authority extended only to making the inspection, and reporting the same, would not be notice to the company.—ALABAMA G. S. R. CO. V. MOORE, Ala., 19 South. Rep. 804.

41. CONTRACT — Novation.—Defendant purchased a mill site of plaintiff, executing his notes therefor. It was ascertained that another owned a half interest in a larger tract, including the mill site; and defendant purchased such interest, and also plaintiff's interest in the entire property, executing other notes to plaintiff, and receiving a conveyance of the entire tract: Held, that the second transaction did not operate as a novation of the former contract, the evidence showing that such was not the intention of the parties.—HENRY V. NUBERT, Tenn., 35 S. W. Rep. 444.

42. CONTRACT—Parol Evidence—Mistake.—Negligence of a party to a written contract in voluntarily signing, without reading, the contract, no fraud being shown, prevents him from contradicting its terms by parol evidence.—DELLINGER V. GILLESPIE, N. Car., 24 S. E. Rep. 538.

43. CONTRACT—Subscription.—A company having offered to build a mill at a certain place if a site and a certain amount was given it as a *bonus*, a subscription paper was circulated, and defendant telegraphed a person who approached him on the matter that he would give $1,000 if the mill was built. This was attached to the subscription paper, and thereafter, the full amount being subscribed, the mill was completed in a reasonable time, without any formal acceptance of the offer, but without it having been withdrawn: Held, that there was a valid contract.—SUPERIOR CONSOL. LAND CO. V. BICKFORD, Wis., 67 N. W. Rep. 45.

44. CONTRACTS—Agents — Undisclosed Principals.—An agreement between two brokers, each acting for

an undisclosed principal, does not give rise to two distinct contracts, one between the brokers and the other between the principals, but to one contract only, and separate satisfactions cannot be obtained from both broker and principal for a cause of action arising out of such contract.—ORVIS v. WELLS, FARGO & CO., U. S. C. C. of App., 73 Fed. Rep. 110.

45. CONTRACT—Consideration.—Where the sufficiency of the complaint is first questioned on appeal, its defects will be considered cured by the verdict, unless it omits some material fact. Where defendant sold plaintiff a harvesting machine, and on its failure to do good work agreed that if it did not do good work in the next harvest it would furnish another one, such agreement was based on a sufficient consideration.—PLANO MANUF'G CO. v. KESLER, Ind., 43 N. E. Rep. 925.

46. CONTRACTS—Construction—Contradictory Provisions.—Where a contract is distinct, guarantying 50 per cent. profit on the cost, and a supposed explanatory clause is added, which is inconsistent with it, and would partially destroy it, the explanatory clause will be disregarded in construing the contract.—STRAUS v. WANAMAKER, Penn., 34 Atl. Rep. 648.

47. CONTRACTS — Interpretation — Credit Insurance Policy.—A contract by which a corporation, though called a "guarantee" or "surety" company, undertakes, in consideration of premiums paid, to indemnify the other party to such contract against losses by uncollectible debts, is not a contract of suretyship, but a policy of insurance, and, as such, subject to the rule that any ambiguities in the policy drawn up by the insurer, who makes his own conditions, are to be resolved against the draftsman.—TEBBETS v. MERCANTILE CREDIT GUARANTEE CO. OF NEW YORK, U. S. C. C. of App., 73 Fed. Rep. 95.

48. CONTRACTS—Ratification — Personal Liability of Agent.—Where a proposition is made in writing by certain contractors to erect a church building for an amount named therein, in accordance with annexed specifications, which proposition is addressed to the building committee, and is accepted by W and B, over their individual signatures, and the contractors proceed with the work, and receive a large portion of the pay therefor from the pastor of the church, representing the congregation, said contractors must be held to have contracted with W and B as the building committee of said church, and this contract is ratified by their proceeding with the work, and receiving compensation therefor from the pastor representing the church.—JOHNSON v. WELCH, W. Va., 24 S. E. Rep. 585.

49. CONTRACTS—Rescission—Tender.—One who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration therefor received by him, provided it be of any value. Property, the loss of which would in any way result in disadvantage or inconvenience to the adverse party, must in such case be returned, although it possesses no intrinsic or market value.—BUILDING & LOAN ASS'N OF DAKOTA v. CAMERON, Neb., 66 N. W. Rep. 1109.

50. CONTRACTS—Signing—Evidence.—Where a bond conditioned on the performance of a contract refers to the contract as thereto attached, an execution of the bond, with the contract attached thereto, is an execution of the contract also.—BUSCH v. HART, Ark., 35 S. W. Rep. 534.

51. CORPORATIONS—Contract—Liability of Promoters.—Where an attorney is employed, by individuals seeking to incorporate, to prepare the incorporation papers, and is authorized to contract for printing, the promoters of the corporation are personally liable for such contract made preliminary to organization.—HERSEY v. TULLY, Colo., 44 Pac. Rep. 854.

52. CORPORATIONS—Foreign Corporations—Interstate Commerce.—The law of 1889, requiring foreign corporations transacting or soliciting business in Texas, or maintaining a general or special office in the State, to file their articles of incorporation and obtain a permit therefor, does not apply to a corporation doing business in another State, which ships goods, on an unsolicited order, to a resident of Texas, and such corporation may maintain an action to recover for such goods.—H. ZUBERBIER CO. v. HARRIS, Tex., 35 S. W. Rep. 408.

53. CORPORATIONS — Foreign Corporations — Stockholders' Liability.—A creditor of an insolvent foreign corporation may maintain in this State, against its stockholders of whom the court has jurisdiction, an action in the nature of a creditors' bill to obtain payment of his claim against such corporations from the unpaid balances of subscriptions by such stockholders to its capital stock. The remedy provided by sections 2600, 2602, Gen. St. 1894, is not applicable where it is sought to reach such unpaid subscriptions to the stock of a foreign corporation.—RULE v. OMEGA STOVE & GRATE CO., Minn., 67 N. W. Rep. 60.

54. CORPORATIONS—Hypothecation of Bonds.—A corporation issued bonds in excess of the value of its assets, and assigned them to certain creditors, as collaterals for existing liabilities and for future advances. It secured the bonds by a mortgage of all its property, stipulating for retention of possession for 10 years, leaving other creditors wholly unprovided for, and without means issuing out of its business to pay them anything: Held, that the mortgage and bonds were void as between the unsecured creditors and those who accepted the conveyance with notice of the facts, though they had no intention to hinder and delay the unsecured creditors, and though the concern may have been, at the time, solvent.—AGE-HERALD CO. v. POTTER, Ala., 19 South. Rep. 725.

55. CORPORATIONS—Insolvency—Rights of Creditors.—Where a corporation becomes insolvent, and ceases to do business, or by any act terminates its business without intention or ability to resume, its property and assets become a trust fund for all its creditors, between whom it can create no preference; nor can a creditor, by his own act, obtain a preference over others, who are in equity common owners of the property with him.—ORR & LINDSLEY SHOE CO. v. THOMPSON, Tex., 35 S. W. Rep. 473.

56. CORPORATIONS—Officers— Warehouse Receipts.—Where the court erroneously charged that liability of a warehouseman depended upon the fact that there was cotton stored and covered by the receipts, unless the warehouseman was estopped to deny such fact because of representations by the person in charge of the warehouse that there was cotton there, such error is not cured by a subsequent instruction that defendant cannot be estopped from denying the genuineness of the receipts unless he has stated that there was cotton in the warehouse, knowing at the time that the bank making the inquiry intended to act on such statement.—CORN EXCHANGE BANK OF CITY OF NEW YORK v. AMERICAN DOCK & TRUST CO., N. Y., 43 N. E. Rep. 915.

57. CORPORATIONS—Rights of Stockholders.—A holder of railroad stock, issued to him as full paid, in payment of undisputed debts due to a construction company, whose claims have been assigned to him, takes it free of all trusts or obligations in favor of the company issuing it, and is under no duty to that company or to its other stockholders to continue in the ownership thereof, for the purpose of facilitating pending negotiations for the transfer of control of the company to another railroad corporation, but may sell the same to a rival company also seeking control, or to whomsoever he sees fit, and at any price he can obtain.—FARMERS' LOAN & TRUST CO. v. CHICAGO, P. & S. RY. CO., U. S. S. C., 16 S. C. Rep. 917.

58. CORPORATIONS— Unpaid Stock.—One who takes an assignment of stock, accompanied by a transfer to his name on the books, and receives a certificate from the corporation, issued to him in his own name, reciting that he is entitled to so many shares, on each of which a certain sum has been paid, leaving a specified amount "to be paid when called for," is liable, as a

subscriber, for the balance due on the stock.—GLENN v. PORTER, U. S. C. C. of App., 73 Fed. Rep. 275.

59. COVENANTS—Breach of Warranty.—Where the owner of a section of land conveyed by warranty deed the southwest quarter thereof—so described in the deed—but by mistake pointed out as included therein a strip belonging to an adjoining owner, the south line of the grantor's section, having been wrongly located on such adjoining land, and a furrow plowed around the section as so surveyed, the effect of the deed, as between the parties thereto, was to convey the strip pointed out by the grantor as his.—MEADE v. BOONE, Tex., 35 S. W. Rep. 483.

60. COVENANT—Breach of Warranty—Damages.—Act 1824, p. 24, § 4, as amended in 1879, providing that in an action on a covenant the measure of damages shall be the amount of the purchase money "from the time of eviction," has reference only to cases of actual eviction, and does not apply to an action for breach of warranty by failure of title to a part of the land conveyed, the grantee never having had possession of such portion.—HUNT v. NOLEN, S. Car., 24 S. E. Rep. 543.

61. CRIMINAL EVIDENCE—Forgery.—On the trial of a person accused of forgery, the alleged forged paper must be produced or its non-production satisfactorily accounted for, by showing it to be lost, destroyed, or in the hands of the accused or his friends; and, in the latter case, notice to produce it must be given to the accused or his counsel before evidence of its existence, character and contents is admissible.—STATE v. LOWRY, W. Va., 24 S. E. Rep. 561.

62. CRIMINAL LAW—Assault with Deadly Weapon.—Under an indictment charging an assault with a deadly weapon, where the proof showed that defendant had struck with a small rock, an instruction that if defendant "struck and wounded with rock or other hard substance, deadly weapon or weapons," they should find him guilty, is erroneous in that it assumes a rock to be a deadly weapon, it being a question for the jury whether the stone was in fact a deadly weapon.—MCWILLIAMS v. COMMONWEALTH, Ky., 35 S. W. Rep. 538.

63. CRIMINAL LAW—Continuance.—An agreement between an attorney for a defendant and the attorney for the State that the trial should be postponed until defendant's attorney had finished another trial and could be present, unless made in writing, as required by the rules, or consented to by the court, does not, in the absence of artifice or fraud, entitle defendant to a continuance on account of the absence of the attorney.—MIXON v. STATE, Tex., 35 S. W. Rep. 394.

64. CRIMINAL LAW—False Pretenses.—Under Pen. Code, § 234, providing for the punishment of any person defrauding another by any false pretense, an information which charges that defendant feloniously, and with intent to defraud, represented that he had money in bank, with a right to draw checks against the same; that he gave a check, by means of which false representations with intent to defraud he obtained certain personal property, is sufficient, although it does not aver specifically that the alleged false pretenses were made with a view to effect a sale, and that by reason thereof the party was induced to make the sale and part with his property.—STATE v. BOKIEN, Wash., 44 Pac. Rep. 889.

65. CRIMINAL LAW—Gaming House.—A house where persons are permitted habitually to assemble to bet money on the result of a horse race is a gaming house, and therefore a common nuisance.—BOLLINGER v. COMMONWEALTH, Ky., 35 S. W. Rep. 553.

66. CRIMINAL LAW—Homicide—Self-defense.—Where there is no intention to provoke a difficulty with a view of entering into a fight with his adversary, the person giving the provocation does not lose his right of self-defense.—CARTER v. STATE, Tex., 35 S. W. Rep. 378.

67. CRIMINAL LAW—Larceny—What Constitutes.—Larceny of a steer is established if it is shown that respondents feloniously killed it, and carried away and appropriated the meat, and in so doing moved the steer, while alive, from the place where they found it, though they did not, till after it was killed, take it out of the inclosure where they found it.—STATE v. GILBERT, Vt., 34 Atl. Rep. 697.

68. CRIMINAL LAW—Sodomy—Woman.—Woman is included under the term "mankind," as used in Rev. Pen. Code, art. 364, defining sodomy.—LEWIS v. STATE, Tex., 35 S. W. Rep. 372.

69. CRIMINAL LAW—Swindling.—In a prosecution for swindling by the negotiation of a worthless note, purporting to be a vendor's lien note, taken by defendant in the sale of land to which he had no title, other notes, taken as a part of the swindling scheme, are admissible in evidence to show the intent of defendant.—HUTCHERSON v. STATE, Tex., 35 S. W. Rep. 375.

70. CRIMINAL PRACTICE — Indictment — Kindred Offenses.—Kindred offenses, generic in kind, growing out of the same transaction, may be charged in the same indictment, provided they be incorporated in separate counts.—STATE v. WREN, La., 19 South. Rep. 745.

71. CRIMINAL PRACTICE — Perjury — Indictment.—Neither at common law, nor under Rev. St. 1895 (Pen. Code, art. 201), providing that "perjury is a false statement deliberately and willfully made, relating to something past or present, under the sanction of an oath or affirmation," etc., is it necessary for an indictment to allege that the party charged with making the false statements knew they were false when he made them, but it is sufficient to allege that he deliberately and willfully swore falsely.—FERGUSON v. STATE, Tex., 35 S. W. Rep. 369.

72. DECEIT—Fraud—Representations as to Financial Standing.—A person about to enter into a contract with a stranger in a distant State, which required large advances of money, inquired of a member of a banking firm, doing business in the region of the stranger's residence, as to the latter's business character and responsibility. The banker made certain favorable statements, and also solicited and obtained for his firm the banking business connected with the transfer of the funds: Held, that the firm was under no obligation to make a voluntary disclosure of the fact of a considerable indebtedness to them by the stranger arising from his ordinary business transactions, when they had no reason to question his integrity or financial ability.—RANDOLPH v. ALLEN, U. S. C. C. of App., 73 Fed. Rep. 23.

73. DEED — Boundaries — Courses and Distances.—Where the deeds of adjoining owners, claiming through a common grantor, called by courses and distances for the same line as established by actual survey as the division line, and the line marked by enduring monuments was found, which, with due allowance for variation, agreed with calls of the deed, the line so found was controlling.—FULLER v. WEAVER, Penn., 34 Atl. Rep. 635.

74. DEED—Cancellation.—A party who seeks to cancel a contract of sale because of mutual mistake must allege and show himself prompt, eager, ready and willing to place the other party to such contract in *statu quo*.—CHRISTIAN v. VANCE, W. Va., 24 S. E. Rep. 596.

75. DEED—Covenants Creating Easement.—Where a deed recites that the grantor, for himself, his heirs and assigns, "doth hereby covenant, promise and agree that the house on the lot adjoining shall be forever hereafter restricted from having any building, or part of a building, attached to said messuage thereon erected of a greater height than ten feet from the surface of the yard," and a subsequent conveyance, by the same grantor, of the adjoining lot, imposes on that grantee and his assigns forever subserviency to such restriction, the covenant must be construed as running with the land, and not as limited to the duration of the building then on such adjoining lot.—LANDELL v. HAMILTON, Penn., 34 Atl. Rep. 663.

76. DEED OF TRUST—Sale.—Where a court orders a trustee to sell land under a deed of trust, it is not re-

versible error to omit to give a day to redeem, or to require bond of the trustee before sale, in a case of an injunction by the debtor to restrain a sale by a trustee, no other creditor being involved.—WATTERSON v. MILLER, W. Va., 24 S. E. Rep. 578.

77. DESCENT AND DISTRIBUTION—Adopted Children.—Where a child was adopted by a husband, she does not, under Rev. St. 1894, ch. 837 (Rev. St. 1881, § 825), providing that after such adoption she shall be entitled to all the rights of a natural child in the estate of her adopted father, become a child of the wife, so as, on the death of the husband, and a second marriage by the wife, to prevent the wife from alienating the land received from the estate of the first husband.—KEITH v. AULT, Ind., 43 N. E. Rep. 924.

78. DIVORCE—Plea of Reconciliation.—A judgment of separation *a mensa et thoro* does not warrant a judgment of divorce *a vinculo*, on the petition of the one against whom it was obtained, if the spouse in whose favor the judgment of separation from bed and board was pronounced pleads, in defense of the suit, willingness to become reconciled.—MAZERAT v. GODEFROY, La., 19 South. Rep. 756.

79. DIVORCE—Support of Children.—Where the custody of the children is granted the wife, in a decree of divorce, together with the greater portion of the husband's property, a provision requiring payment by the husband of a yearly sum, for seventeen years, for the support of the children, made without respect to the earning capacity of the husband, and without regard to the capacity of the children to earn a livelihood, is unauthorized.—PAPE v. PAPE, Tex., 35 S. W. Rep. 479.

80. DOWER INTEREST—Assignment.—If a widow, before her dower is assigned, conveys her interest, the heir may recover the land in ejectment against her vendee.—BARNETT v. MEACHAM, Ark., 35 S. W. Rep. 533.

81. EASEMENTS—Obstructing Right of Way.—Defendant having built a fence across a private way, over which plaintiff had a right of passage, the latter applied to the village trustees to make the way public, which they consented to do, on condition that plaintiff pay defendant's land damages: Held, that the amount so paid could not be recovered as a part of plaintiff's damages, in a suit against defendant for obstructing the way, the injury sustained in paying the same not being the proximate result of defendant's wrongful act.—HOLMES v. FULLER, Vt., 34 Atl. Rep. 699.

82. EJECTMENT — Permanent Obstruction of Street.—Abutting property owners, being the owners of the fee in a public street, subject to the easement, can bring ejectment for the permanent obstruction by a third person of the surface of the street adjacent to their property.—THOMAS v. HUNT, Mo., 35 S. W. Rep. 581.

83. ELECTIONS—Ballots and Voting.—St. § 1475, which requires that the voter shall take an oath of disability before his ballot can be marked for him and deposited, is mandatory; and a ballot so marked without his declaration on oath being made is illegal, and cannot be counted.—MAJOR v. BARKER, Ky., 35 S. W. Rep. 543.

84. EMINENT DOMAIN—Award.—Where there are conflicting claims of mortgagees and subsequent grantees as to an award for an easement condemned, an order of the court determining that issue must recite all the facts necessary to show that the successful party is entitled to the award.—GRADY v. NORTHWESTERN LOAN & INVESTMENT CO., Wis., 67 N. W. Rep. 34.

85. EMINENT DOMAIN — Compensation.—A railroad company, whose charter provided that the compensation for land condemned should be assessed at the value of the land if the road had not been built, appropriated land for its right of way without condemnation, and seven years after the construction of the road brought proceedings to condemn: Held, that in assessing the damages the value of the land should be considered as of the time the title was attempted to be divested from the owner, and not as of the time of the appropriation by the railroad company.—LOUISVILLE, N. O. & T. RY. CO. v. HOPSON, Miss., 19 South. Rep. 718.

86. EQUITY—Bill to Enjoin Foreclosure Sale.—A cross-bill in a State court to foreclose a mortgage was dismissed, but, on appeal, the State supreme court reversed the decree, entered a decree of foreclosure, and appointed its own clerk to make the sale. Thereupon the mortgagors filed in the State court, whose decree was reversed, a bill to enjoin the clerk from making the sale, alleging fraud in the foreclosure decree: Held, that this was not an original bill in the nature of a bill of review, nor was the suit in any sense a mere continuance of the former suit, but, on the contrary, was an independent original suit.—CARVER v. JARVIS-CONKLIN MORTGAGE TRUST CO., U. S. C. C. (Tenn.), 73 Fed. Rep. 9.

87. EQUITY—Jurisdiction—Ancillary Suits.—A suit in equity, brought by the receiver of an insolvent corporation, appointed by a federal court, against the subscribers to the stock of the corporation, to collect the balances due on their subscription, is within the jurisdiction of such federal court in equity, as an ancillary suit, without regard to the citizenship of the parties, or the adequacy of the remedy at law.—BAUSMAN v. DENNY, U. S. C. C. (Wash.), 73 Fed. Rep. 69.

88. EQUITY—Laches.—When lapse of time is sufficient to raise the presumption of assent, acquiescence, or waiver on the part of plaintiff, or those under whom he claims, he cannot recover unless he rebuts such presumption by a reasonable and satisfactory excuse for the delay in the assertion of his rights not founded on his own laches or neglect.—BRYANT v. GROVES, W. Va., 24 S. E. Rep. 605.

89. EQUITY—Quieting Title.—Equity will exercise jurisdiction to remove a cloud resting upon title to real estate (1) where the complainant has only the equitable title, and is either in or out of actual possession, and whether his adversary is in or out of actual possession; (2) where complainant, though having legal title, is in actual possession. It will not exercise such jurisdiction where complainant has legal title, and is not in actual possession, no matter whether his adversary is in or out of actual possession.—MOORE v. MCNUTT, W. Va., 24 S. E. Rep. 682.

90. EQUITY—Reformation of Insurance Policy—Mistake.—To authorize the reformation of an insurance policy on the ground of mistake the mistake must have been mutual.—TRUSTEES OF ST. CLARA FEMALE ACADEMY OF SINSINAWA MOUND v. DELAWARE INS. CO., Wis., 66 N. W. Rep. 1140.

91. EQUITY — Rescission.—Since the conveyance of his homestead by a grantor cannot be fraudulent as to his creditors, rescission of a deed thereto, executed with intent to defraud the creditors of the grantor, should not be denied on the ground that the parties were in *pari delicto*.—SALLEE'S EX'R v. SALLEE, Ky., 35 S. W. Rep. 43[illegible].

92. ESTOPPEL—Boundaries Fixed by Grantor.—Where a person sells part of a tract of land by general description, and himself subsequently fixes the corners and lines, and permits the grantee to make improvements with reference to the lines thus fixed, he will be bound by his own identification of the land.—GALLAGHER v. RILEY, Tenn., 35 S. W. Rep. 451.

93. EVIDENCE—Irrigation Company—Custom.—Local customs cannot change the law of negligence; but when reasonable, uninterrupted, and uniform, and not contrary to public policy, they may affect the interpretation of contracts made in their locality. Hence evidence showing the care used by other irrigation companies in cleaning their ditches was not admissible to prove that defendants used due care, by cleaning their ditch at the same time and in the same way.—JENKINS v. HOOPER IRRIGATION CO., Utah, 44 Pac. Rep. 829.

94. EVIDENCE—Negotiable Instruments—Fraudulent Alteration.—Where the right of a bank to recover the amount paid to the payee and indorser of a check depended solely on its proving that the check had been fraudulently raised, it was error to admit evidence

that the bank was, at the time of trial, out of business. —BIRMINGHAM NAT. BANK V. BRADLEY, Ala., 19 South. Rep. 791.

95. EVIDENCE—Parol Evidence—Contract.—A written contract, purporting to state the whole contract, providing only for sale of a store and the stock of general merchandise therein, followed by a deed conveying the same and nothing more, cannot, in the absence of fraud or mistake, be varied by parol to show that furniture, tools, and implements used in and about the store, but not constituting part of the fixtures, were to pass with it.—CALDWELL V. PERKINS, Wis., 67 N. W. Rep. 29.

96. EXECUTION—Proceeds of Sale of Land.—A senior judgment lienor is not entitled to have the proceeds of an execution sale of land under a junior judgment, subject to the lien of the senior judgment, applied to the satisfaction of his senior lien.—CALDWELL V. HOUSER, Ala., 19 South. Rep. 796.

97. EXECUTION SALE — Agreement not to Bid.—The purchase of other judgments by a judgment creditor at a judicial sale, with an understanding that the vendors will not bid, does not render a sale of the land to the purchaser of such judgments fraudulent *per se* as to creditors who were not parties to the agreement, without regard to whether a fraud was actually contemplated or committed.—WOODRUF V. HARRINGTON, Penn., 34 Atl. Rep. 667.

98. FEDERAL COURTS—Jurisdiction of Supreme Court —State Decisions.—A judgment of the highest court of a State will not be reviewed by the supreme court, if it involved the determination of a question, not federal, which is sufficient in itself to sustain the judgment, although a federal question may also have been raised and decided.—DIBBLE V. BELLINGHAM BAY LAND CO., U. S. S. C., 16 S. C. Rep. 939.

99. FEDERAL COURTS — Pleading—Following State Rules.—Though a defendant be permitted by the State practice and rules of pleading, adopted by the federal courts, in accordance with Rev. St. § 914, to unite a plea to the jurisdiction of the court with pleas to the merits, he need not necessarily do so, but he may and the better practice ordinarily is to present his objections to the jurisdiction, before pleading to the merits; and the fact that such a plea is called a "plea in abatement," though properly designated, under the State practice, as an "answer," is no reason for striking it out.—JONES V. ROWLEY, U. S. C. C. (Cal.), 73 Fed. Rep. 286.

100. FEDERAL JURISDICTION — Diverse Citizenship.— Diverse citizenship, to give jurisdiction, must exist at the commencement of the suit; and, if it exist then, subsequent changes are immaterial. Even if the allegations of the bill fail, in other respects, to state a case within the jurisdiction, and amendments are subsequently made which obviate these objections, the suit will still be deemed to have commenced with the original proceedings, and the court will have jurisdiction, although one of the complainants, before the amendments, became a citizen of the same State with defendant.—BRIGEL V. TUG RIVER COAL & SALT CO., U. S. C. C. (Ky.), 73 Fed. Rep. 13.

101. FEDERAL RECEIVERS SUED IN STATE COURTS— Judgment.—The authority given by the act of March 3, 1887, to sue federal receivers without previous leave of the appointing court, makes a judgment obtained against such receivers in a State court, for personal injuries, conclusive as to the right of the plaintiff therein and the amount of his recovery; and it is immaterial that, according to the State procedure, the case was tried without a jury, because neither party demanded a jury.—ST. LOUIS S. W. RY. CO. V. HOLBROOK, U. S. C. C. of App., 73 Fed. Rep. 112.

102. FRAUD — Complaint — Sufficiency.—A complaint which alleged that defendants, by fraudulently and falsely representing that the makers of certain notes were solvent, induced plaintiff to accept them in payment for land conveyed to defendants; that, as a further inducement, defendants promised to indorse them without restriction, but had indorsed them without recourse,—stated a cause of action for the fraudulent representations as to the solvency of the makers. —GATES V. MOLSTAD, Wash., 44 Pac. Rep. 881.

103. FRAUDS, STATUTE OF—Parol Agreement.—A parol contract, by which a father agreed, in consideration of the surrender to him by a daughter of her interest as heir in the unadministered estate of her mother, to devise to the daughter on his death one-fourth of his estate, part of which consisted of land, was unenforceable, as being within the statute of frauds, in the absence of a showing of part performance by the father before his death.—SWASH V. SHARPSTEIN, Wash., 44 Pac. Rep. 862.

104. FRAUDS, STATUTE OF—Sale of Lands.—A paper purporting to express the terms of sale of real property is within the statute of frauds when signed by the vendor's agent, whose sole authority to make the sale rests in parol.—BALDWIN V. SCHIAPPACASSE, Mich., 66 N. W. Rep. 1091.

105. FRAUDULENT CONVEYANCE.—A creditor of an insolvent may legitimately purchase property from his debtor, and pay him the difference between the value of the property and the debt, where he does it in good faith, and for the purpose of securing his debt.—LANGERT V. DAVID, Wash., 44 Pac. Rep. 875.

106. FRAUDULENT CONVEYANCE—Evidence.—The fact that a copartnership, largely indebted, sells most of its property and its business to one of small means, in consideration of a small amount of cash and the purchaser's promissory notes, is a circumstance tending to show that the transaction was fraudulent, but not conclusive, nor, alone, sufficient, evidence that it was fraudulent.—NEBRASKA MOLINE PLOW CO. V. KLINGMAN, Neb., 66 N. W. Rep. 1101.

107. FRAUDULENT CONVEYANCES.—A transfer of property for a valuable consideration may be upheld, though it was intended to defraud creditors, where it is not shown that the grantee had notice of the fraud, or of such facts as would put a prudent man on inquiry. —WOLF V. ARTHUR, N. Car., 24 S. E. Rep. 671.

108. FRAUDULENT CONVEYANCES—Proof of Fraud.—In an action to recover property taken by defendant on execution, and claimed by plaintiff under purchase from execution debtor, which purchase was alleged by defendant to be in fraud of creditors, where the principal witness as to the fraud was the debtor himself, testimony of a third person as to declarations of the debtor regarding statements made by the plaintiff after the purchase is not admissible to corroborate the proof of fraud.—HARTLEY V. WIEDEMAN, Penn., 34 Atl. Rep. 625.

109. FRAUDULENT CONVEYANCES—Voluntary Deeds.— A voluntary deed is fraudulent, by operation of law, where the facts and circumstances clearly show that existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance.—THOMSON V. CRANE, U. S. C. C. (Nev.), 73 Fed. Rep. 327.

110. GARNISHMENT—Earned Fees of Public Officers.— The garnishment of earned fees of a public officer is not contrary to public policy.—THOMPSON V. CULLERS, Tex., 35 S. W. Rep. 412.

111. GARNISHMENT—Legacy in Hands of Executor.— Under Gen. St. § 1231, providing that where a legacy is due or to become due to a defendant in a civil action, in which a judgment for money damages may be rendered, the plaintiff may attach such legacy in the hands of an executor, a legacy is subject to garnishment before the will has been probated.—JOHNES V. JACKSON, Conn., 34 Atl. Rep. 709.

112. GARNISHMENT — Vacating Judgment.—Where a garnishee is negligent in answering interrogatories, and permits a judgment to be entered against him, he can obtain no relief from the judgment.—WARREN V. COPP, La., 19 South. Rep. 746.

113. GIFT CAUSA MORTIS—Delivery.—To constitute a gift *causa mortis* it is not sufficient to establish an in-

tention to make the gift, but there must be a delivery of possession, or some act which vests title in the donee. Neither verbal declarations nor a written statement of a gift are sufficient to pass title to a deposit in a savings bank, evidenced by a bank book, which is not delivered.—MCMAHON V. NEWTOWN SAV. BANK, Conn., 34 Atl. Rep. 709.

114. GIFT CAUSA MORTIS—Delivery.—Delivery at the time of making the gift is essential to a perfect gift *causa mortis*. It is not the possession of the donee, but the delivery to him by the donor that is material. An after-acquired possession, or a previous and continuing possession, of the donee, though by the authority of the donor, is insufficient.—SMITH V. ZUMBRO, W. Va., 24 S. E. Rep. 653.

115. GUARDIAN'S BOND—Limitations.—A guardian is "discharged," within Rev. St. § 3968, providing that an action against the sureties on a guardian's bond must be begun within four years from the time he was discharged, when his guardianship has terminated by the arrival of the ward at the age of 21 years, though the trust relation as to the property continued, and final accounting was not made until a later date.—PAINE V. JONES, Wis., 67 N. W. Rep. 31.

116. HIGHWAYS—Law of the Road—Negligence.—One who drives a truck on what it is to him the left-hand side of the street, in order to reach the store of his employer, which is located on that side, is bound merely to exercise ordinary care to avoid colliding with vehicles approaching from the opposite direction.—PELTIER V. BRADLEY, DANN & CARRINGTON CO., Conn., 34 Atl. Rep. 712.

117. HIGHWAYS—Obstruction.—Where owners of land adjacent to a highway construct a system of artificial ditches converging at a culvert crossing, such highway, so as to discharge an unnatural quantity of water on the lower lands on the opposite side of such highway, the owner of such lower lands cannot dam the culvert on the highway for the purpose of protecting her lands from such overflow.—MYERS V. NELSON, Cal., 44 Pac. Rep. 801.

118. HIGHWAYS—User.—Occasional travel on a road across government land, which has never been laid out, recorded, or worked as a public road, will not constitute it a highway.—SUTTON V. NICOLASIEN, Cal., 44 Pac. Rep. 805.

119. HOMESTEAD.—Where a householder lives on a lot within the corporate limits of a town, and also owns land adjoining it, outside such limits, no part of the latter can be claimed as a part of his homestead, regardless of the value of the lots.—FOUST V. SANGER, Tex., 35 S. W. Rep. 404.

120. HOMESTEAD — Mortgage — Fraud. — Under act April 13, 1893, which renders valid all conveyances made since the act of March 18, 1887, a mortgage of a homestead to which the wife's signature was procured by fraud is valid, though the act of 1887 provided that such a conveyance should be signed by the wife.—HILL V. YARBROUGH, Ark., 35 S. W. Rep. 433.

121. HUSBAND AND WIFE—Alienation of Husband's Affections.—Under Rev. St. §§ 1996, 6869, authorizing a wife to sue alone in her own name, "with the same force and effect," as though unmarried, and entitling her, in her own right, to damages growing out of "the violation of her personal rights," a wife may maintain an action for damages against a third person for alienating the affections of her husband. — NICHOLS V. NICHOLS, Mo., 35 S. W. Rep. 577.

122. INSOLVENCY—Rights of Creditor.—A creditor of an insolvent bank is not entitled as against other creditors to receive dividends out of the general funds in the hands of a receiver on notes held as collateral security and indorsed by the debtor, in addition to dividends on the principal debt.—FIRST NAT. BANK OF NASHVILLE V. WILLIAMSON, Tenn., 35 S. W. Rep. 573.

123. INSURANCE COMPANIES — Service of Process.—When, by the statute of a State, an insurance company, transacting business in such State, is required to file with a designated officer of that State a written appointment of such officer as the person upon whom process, directed against such company, may be served such officer becomes, from the fact of its so transacting business therein, the representative of the company with regard to the service of such process, irrespective of whether such appointment has been so filed or not. —SPARKS V. NATIONAL MASONIC ACC. ASS'N, U. S. C. C. (Iowa), 73 Fed. Rep. 277.

124. INSURANCE COMPANY — Trust — Special Assets—Preferred Claims.—An insurance company deposited with the State treasurer a fund as security for payment of policies though not required to do so by law. The treasurer's receipt described the fund and declared that it was held as a guaranty for the payment of policies in trust for policy holders: Held, that the deposit created a trust fund for the payment of losses on policies which could not be applied to the claims of general creditors until such special claims were satisfied.—BOSTON & A. R. CO. V. MERCANTILE TRUST & DEPOSIT CO., Md., 34 Atl. Rep. 778.

125. INSURANCE—Conditions.—Where a policy provides that it shall be void if the property insured become incumbered by a chattel mortgage, the placing of a mortgage on the property forfeits the policy, though such mortgage be paid off and canceled prior to a loss.—GERMAN-AMERICAN INS. CO. V. HUMPHREY, Ark., 35 S. W. Rep. 428.

126. INSURANCE—Employees' Insurance.—A policy issued to an employer recited that it was issued on application for "indemnity against claims for compensation for personal injuries," and stipulated that assurer should pay to the employer "all sums for which it shall become liable to its employees." The conditions of the policy prohibited the employer from settling with its employees without the consent of the assurer, who was also to assume charge of actions against the employer; and also provided that the employees should not sue on the agreement after a certain time, unless an action against the employer was then pending: Held, that the agreement was one of indemnity against liability, and payment by the employer of a judgment recovered against him was not a condition precedent to the assurer's liability.—HOVEN V. EMPLOYERS' LIABILITY ASSUR. CORP., Wis., 67 N. W. Rep. 46.

127. INSURANCE—Policy—Estoppel.—The fact that an adjuster for an insurance company, after the refusal of an offer of settlement for a loss, told the insured to go on and make out proofs of loss, and afterwards, in writing, called attention to a formal defect in the proofs, which was remedied, will not estop the company to defend against an action for the loss on the ground of the invalidity of the grown policy.—FREEDMAN V. PROVIDENCE WASHINGTON INS. CO., Penn., 34 Atl. Rep. 731.

128. INSURANCE—Warranty in Application—Burden of Proof.—It is not necessary for the plaintiff, in an action on an insurance policy, to aver and prove the truth of representations, amounting to warranties, which are contained in the application only, and not in the policy itself; but it is incumbent upon the defendant, who relies upon the breach of such warranty, to allege it and assume the burden of proof.—AMERICAN CREDIT INDEMNITY CO. V. WOOD, U. S. C. C. of App., 73 Fed. Rep. 81.

129. INTOXICATING LIQUORS.—Act 1887, ch. 167, prohibiting the sale of "intoxicating liquors" as a beverage within four miles of any school house not within the limits of an incorporated town, prohibits the sale of all liquids, of whatever name, kind or quality, which, as a beverage, are intoxicating and produce drunkenness.—MOORE V. STATE, Tenn., 35 S. W. Rep. 556.

130. INTOXICATING LIQUORS—Criminal Prosecution.—In a prosecution for violating the local option law, there was evidence that defendant took money from one P, and procured liquor with it for P: Held, that if defendant was the agent of P in getting the whisky, he would not be guilty of selling liquor.—BOWMAN V. STATE, Tex., 35 S. W. Rep. 382.

131. **Issuance after Repeal of Charter.**—Bonds issued by the president and clerk of the board of trustees of a city, after the charter under which they purport to have been issued has been repealed, are void even in the hands of an innocent holder, although, without any fraudulent intent, they were antedated as of a date when the law was still in force.—Lehman v. City of San Diego, U. S. C. C. (Cal.), 73 Fed. Rep. 105.

132. **Judgment**—Assignment—Rights of Assignee.—Plaintiff obtained judgment against an insolvent corporation of which he was president. This judgment and the proceeds thereof he assigned to a bank. Afterwards, the judgment being opened, on petition of creditors, to try the issue whether it was fraudulent as to them, plaintiff voluntarily took a nonsuit: Held, that the bank, not being a party to the issue, could not be prejudiced in its rights by the acts of plaintiff, but is entitled to the proceeds of the judgment under its assignment.—Reynolds v. Reynolds Lumber Co., Penn., 34 Atl. Rep. 791.

133. **Judgment**—Lien.—Sayles' Civ. St. art. 3160, providing that a judgment lien is lost if execution is not taken out within 12 months, does not apply where, during such time, the property of the judgment defendant is in the hands of a receiver in another action.—Semple v. Eubanks, Tex., 35 S. W. Rep. 509.

134. **Judgment**—New Trial.—A judgment entered after a motion has been made to set aside a verdict and for a new trial, but before such motion has been heard and determined, though irregular, is not void.—Davison v. Brown, Wis., 67 N. W. Rep. 42.

135. **Judgment**—New Trial.—Where defendant, after verdict has been rendered against him, applies for a new trial, but neglects to obtain an order staying entry of judgment until the motion should be determined, a judgment entered on the verdict after the usual three days' notice is valid, and should not thereafter be set aside on motion on the ground that it was entered pending motion for a new trial.—Wheeler v. Russell, Wis., 67 N. W. Rep. 43.

136. **Judicial Sales**—Relief from Laches.—A purchaser at a judicial sale of a decedent's land to pay debts will not be relieved from his purchase because in the order confirming the sale one of the lots purchased was omitted, the description of the lot having been eliminated from the master's report for some reason unknown to the purchaser, where the relief is not sought until three and one-half years after the sale, and after the purchaser had taken possession of the lot, and the petition therefor fails to negative the purchaser's knowledge of the omission at the time of the confirmation.—Ward v. West, Tenn., 35 S. W. Rep. 563.

137. **Landlord and Tenant**—Holding Over—Liability.—Where a tenant holds over, knowing that the premises have been rented to another for the ensuing year, the crop raised by him is subject to the rental contract between the landlord and later tenant, at least to the extent of his liability under his contract for holding over.—Bain v. Wells, Ala., 19 South. Rep. 774.

138. **Landlord and Tenant**—Lease—Renewal.—Where six parties become the joint lessees of real estate for the term of five years with the privilege of continuing the lease for five more years upon giving sixty days' notice prior to the end of the term, one of said lessees has no power to extend such lease by giving the required notice without the concurrence of the other lessees.—Howell v. Behler, W. Va., 24 S. E. Rep. 646.

139. **Landlord and Tenant**—Lease with Option to Purchase.—A lease of a portion of a business stock required the lessee to pay taxes and insurance on, and to keep in proper repair, the entire premises, and gave him the option of purchasing the premises during or at the expiration of the lease, for a certain price, on which rent paid prior to the exercise of the option was to be credited. The lease made no provision for the application of proceeds of insurance in case of loss. The lessee insured in the lessor's name to an amount agreed on by them, and, a loss occurring, the lessor received the insurance money, and expended part of it in restoring the premises: Held, that the lessee, on subsequently exercising his option of purchase, was entitled to have the balance of the insurance money in the lessor's hands credited as a payment on the price.—Williams v. Lilley, Conn., 34 Atl. Rep. 765.

140. **Landlord and Tenant**—Leases—Forfeiture.—A lessor authorized by the lease to enter and take possession, as for forfeiture, on royalties payable thereunder remaining unpaid for twelve months after the time specified for payment, is not obliged, before exercising such right, to give notice to an assignee of the lease; it is for such assignee to take notice, not only of the conditions of the lease, but the state of the payments.—Comegys v. Russell, Penn., 34 Atl. Rep. 657.

141. **Landlord and Tenant**—Lien for Advances.—A landlord entitled to a lien for advances made to his tenant, under Code, § 3056, cannot make a valid transfer or assignment to another of his right to make such advances, and to have a landlord's lien therefor.—Henderson v. State, Ala., 19 South. Rep. 733.

142. **Landlord and Tenant**—Tenancy by Sufferance.—After defendant had entered into possession with her husband of land of his, he mortgaged it, and then abandoned her, leaving her in occupation. Subsequently he conveyed it by deed to a third person. Defendant continued in possession, and the land was sold under the mortgage to plaintiffs: Held, that defendant was tenant by sufferance of plaintiffs.—Taylor v. O'Brien, R. I., 34 Atl. Rep. 739.

143. **Libel** — Privileged Communication. — Where matter alleged to be libelous was contained in a letter written by defendant to his mother, and its only publication was by sending the letter to his mother by mail, the communication was conditionally privileged, and it was incumbent on plaintiff to establish malice on the part of defendant.—Kimble v. Kimble, Wash., 44 Pac. Rep. 866.

144. **License between Individuals**—Revocation.—Under 1 Hill's Ann. Code, § 1422, providing that all conveyances of any interest in, and all contracts creating any incumbrance on real estate, shall be by deed, a verbal license to enjoy permanent privileges on the land of the licensor is revocable at his will, though money has been expended thereon by the licensee.—Hathaway v. Yakima Water, Light & Power Co., Wash., 44 Pac. Rep. 896.

145. **Limitation of Actions**—Curator's Bond.—Limitations do not begin to run against a cause of action on a curator's bond for incumbering the land of his ward with a personal debt, either as to the curator's estate or the sureties on his bond, until the ward has suffered some substantial damages by reason thereof, as by payment of attorney's fees in a suit to remove such incumbrance.—State v. Tittmann, Mo., 35 S. W. Rep. 579.

146. **Limitation of Actions**—Federal Courts—State Statutes.—Under Rev. St. § 721, State statutes of limitation are to be regarded as rules of decision in actions at law in the federal courts, unless otherwise provided by act of congress or treaty, although such statutes are expressly limited to actions brought in the courts of the State.—Fearing v. Glenn, U. S. C. C. of App., 73 Fed. Rep. 116.

147. **Limitations** — Suits by United States.—Statutes of limitation of the several States do not apply to actions wherein the government of the United States is plaintiff.—United States v. Belknap, U. S. C. C. (Cal.), 73 Fed. Rep. 19.

148. **Malicious Prosecution** — Advice of Counsel.—While a full and complete statement of the facts, to a reputable attorney, and the filing of a criminal charge on his advice, in good faith and without ulterior motive, are a complete defense to an action for malicious prosecution, yet, though the other facts may be established beyond question, the question of good faith is one for the jury, where minds might draw different

conclusions from the evidence.—BILLINGSLEY V. MAAS, Wis., 67 N. W. Rep. 49.

149. MALICIOUS PROSECUTION — Probable Cause.—A person may institute a criminal prosecution when the apparent facts are sufficient to induce a discreet and prudent person to believe that the party to be accused has committed the crime with which he is to be charged; and, although the accused may be adjudged innocent, the complainant will not be liable in an action for malicious prosecution.—FRY V. KAESSNER, Neb., 66 N. W. Rep. 1126.

150. MANDAMUS — Performance of Ministerial Duty.—While the courts can have no right to pronounce an abstract opinion upon questions entirely political, to compel officers to perform specific duties imposed upon them by law, whether relating to elections or to any other duty devolving upon them, writ of *mandamus* issues to compel a proper execution of a purely ministerial duty.—SUPERVISORS OF ELECTION OF PLAQUEMINES PARISH V. LIVAUDIAS, La., 19 South. Rep. 750.

151. MANDAMUS—Title to Office.—*Mandamus* is not a proper remedy by which a person appointed to a precinct board of registry, under section 3 of the election law of 1895 (P. L. 1895, p. 660), may lawfully call in question the title of an incumbent of the office, or oust a *de facto* officer therefrom. *Mandamus* is the proper remedy by which a person nominated by the chairman of the county committee for appointment as member of a precinct board of registry may compel the board of election to appoint him to the office.—FORT V. HOWELL, N. J., 34 Atl. Rep. 751.

152. MARINE INSURANCE — Abandonment.—When the insured is paid as for a total loss, the property insured passes to the insurer without any formal abandonment.—GRUMMOND V. THE BURLINGTON, U. S. D. C. (Mich.), 73 Fed. Rep. 258.

153. MARRIAGE—Validity — Dissolution.—A marriage between parties, one of whom has a lawful husband or wife living, is absolutely void, at the common law, for all purposes. There can be, strictly speaking, no decree of divorce dissolving such a marriage. The proper decree in such case is one declaring the marriage null and void *ab initio*.—ROONEY V. ROONEY, N. J., 34 Atl. Rep. 682.

154. MARRIED WOMAN—Charges against Estate.—The liability of the separate real estate of a married woman to be subjected to the payment of claims against her is governed by the law of the State where such real estate is situated.—WICK V. DAWSON, W. Va., 24 S. E. Rep. 587.

155. MARRIED WOMEN—Infants — Limitations.—Limitations do not run against the right of an infant *feme covert* to disaffirm a conveyance during marriage.—FOX V. DREWRY, Ark., 35 S. W. Rep. 533.

156. MASTER AND SERVANT — Assumption of Risk.—Where a servant willfully encounters a danger which is known to him, the master is not responsible for an injury occasioned thereby.—MASSIE V. PEEL SPLINT COAL CO., W. Va., 24 S. E. Rep. 644.

157. MASTER AND SERVANT—Assumption of Risk.—A party who enters the service of a railroad company as a brakeman takes upon himself the natural and ordinary risks and perils incident to the performance of such services, including the perils arising from the carelessness and negligence of those who are in the same employment as fellow-servants.—YOUNG V. WEST VIRGINIA C. & P. RY. CO., W. Va., 24 S. E. Rep. 615.

158. MASTER AND SERVANT—Contributory Negligence.—A switchman who was injured while attempting to uncouple a car from in front of an ordinary road locomotive, having a pilot, while in motion,—such act being shown to be very dangerous,—when the engineer was subject to his orders, and he had the right to have the engine stopped while uncoupling the car, was guilty of contributory negligence, even if acting under direct orders of a superior.—GEORGE V. MOBILE & O. R. CO., Ala., 19 South. Rep. 784.

159. MASTER AND SERVANT — Fellow-servants.—By Laws 1893, p. 120, four requisites are given in section 2 to constitute co-employees fellow-servants: They must (1) be engaged in the common service (2) in the same grade of employment, (3) working together at the same time and place, and (4) to a common purpose: Held, that an engineer and a switchman, who were members of the same switching crew, engaged in switching cars under a common foreman, were fellow-servants, although employed and discharged by different superiors.—GULF, C. & S. F. RY. CO. V. WARNER, Tex., 35 S. W. Rep. 364.

160. MASTER AND SERVANT — Negligence of Servant.—Mere negligence of a servant does not create a joint liability of such servant and his master for damage resulting from the negligence.—LANDERS V. FELTON, U. S. C. C. (Ky.), 73 Fed. Rep. 311.

161. MASTER AND SERVANT — Wrongful Discharge.—In an action by an employee for wrongful discharge, the amount of wages for the remainder of the term of service under the contract is, *prima facie*, the measure of damages; and the amount earned by plaintiff during such time, or that he might reasonably have earned, is matter of defense, in mitigation of damages.—BABCOCK V. APPLETON MANUF'G CO., Wis., 67 N. W. Rep. 33.

162. MECHANIC'S LIEN — Land of Third Person.—A person who furnishes materials for use in the erection of buildings on land to one in possession thereof, under contract of sale, may acquire a mechanic's lien on the premises for any unpaid amount of the price of the materials; but, if there is no agreement between the vendor and vendee of the land that the improvements shall be made, the lien can only attach to the interest of the vendee, and will be subsequent and inferior to the lien of the vendor for any balance of the purchase price for the land remaining unpaid.—FULLER V. PAULEY, Neb., 66 N. W. Rep. 1115.

163. MECHANICS' LIENS—Chattel Mortgage.—Where a company succeeded a firm in the operation of a mill under a contract and lease which made the firm and company joint operators of the mill, continued the employees of the firm as employees of the company, and required the firm to pay them, and provided that the firm was to receive the entire output, and the firm had, before the inception of the contract, given a chattel mortgage of the stock and future product of the mill, a judgment enforcing claim liens for labor of the employees performed for both, against shingles manufactured by both, as a superior lien to the chattel mortgage, was supported by findings which adopted the contract and lease, though there was also a finding that the employees worked under a separate contract of employment with each.—HOWEY V. BINGHAM, Wash., 44 Pac. Rep. 886.

164. MECHANICS' LIENS — Evidence.—Evidence that material contracted for was delivered at a building, and that a large part of the material was used in the building, without any evidence that any of it was not so used, is sufficient to show that all of it was used in the construction of the building, within 2 Hill's Ann. Laws, § 3669, giving a right of lien for material furnished "to be used in the construction, alteration, or repair of a building."—ALLEN V. ELWERT, Oreg., 44 Pac. Rep. 823.

165. MORTGAGE—Attorney's Commissions—Demand.—To entitle plaintiff to attorney's commissions stipulated for in case of suit on mortgage, it is not necessary to demand payment before bringing suit, the mortgage being overdue.—WALTER V. DICKSON, Penn., 34 Atl. Rep. 646.

166. MORTGAGES — Priorities — Parol Agreement.—Parol evidence is admissible to prove an agreement between vendor and purchaser, and a third person, at the time of the sale, whereby the latter advanced a part of the purchase money, and took a mortgage from the vendee, which was to be prior to that given the vendor to secure the balance of the price, and that such mortgage was in fact delivered prior to the execution and delivery of the vendor's mortgage.—HOFLER V. CUTLER, N. J., 34 Atl. Rep. 746.

167. MORTGAGE — Priority Foreclosure.—By virtue of the registry statute (Sayles' Rev. Civ. St. art. 4332), a mortgage taken in good faith, and for value, is not invalidated by an unrecorded deed of previous date, where the grantee is not in possession. A grantee of land, who, by reason of a failure to record his deed, takes title subject to a subsequently executed mortgage, is yet the owner, subject only to the mortgage lien, and cannot be deprived of his title by foreclosure proceedings brought after the recording of his deed, and to which he is not a party.—HAYS V. TILSON, Tex., 25 S. W. Rep. 515.

168. MORTGAGE—Redemption from Foreclosure Sale. —A count for money had and received may be supported by evidence that defendant obtained money from plaintiff by the taking of any undue advantage. —PRICHARD V. SWEENEY, Ala., 19 South. Rep. 730.

169. MUNICIPAL CORPORATIONS — Charter Powers—Revocation.—Powers conferred on a municipal corporation by its charter are not contracts with the State, so as to render laws revoking them laws impairing the obligation of contracts within the constitutional prohibition.—GAS & WATER CO. OF DOWNINGTON V. CORPORATION OF BOROUGH OF DOWNINGTON, Penn., 34 Atl. Rep. 799.

170. MUNICIPAL CORPORATIONS — Contracts — Rescission.—Equity will not rescind a continuing contract for an occasional and immaterial breach, but only for a breach going to the very substance of the contract.— LIGHT, ETC. CO. OF JACKSON V. CITY OF JACKSON, Miss., 19 South. Rep. 771.

171. MUNICIPAL CORPORATIONS—Defective Sidewalks —Notice.—In an action against a city for injuries due to a defective sidewalk, evidence of other defects in the immediate vicinity is admissible to show notice to the defendant.—MOORE V. CITY OF KALAMAZOO, Mich., 66 N. W. Rep. 1089.

172. MUNICIPAL CORPORATIONS—Drainage—Damages. —Where an old drain, which had been constructed in part, at least, by public authority, and over which some control was exercised by the municipality both at the time of its construction and afterwards, was closed up at time of the construction of a new sewerage system, at a point below plaintiff's property, and the circumstances were such that there was reasonable ground to expect that water and sewage, after having been collected in the old drain, by the closing up of the outlet, would escape therefrom and flood plaintiff's property, the city was liable to plaintiff for resulting damages.—SCHROEDER V. CITY OF BARABOO, Wis., 67 N. W. Rep. 27.

173. MUNICIPAL CORPORATIONS — License Tax—Ordinance.—Under a power to license an occupation, given by its charter, a city may impose a fee sufficient to pay the reasonable cost of issuing the license, but not for the purpose of raising revenue; and an ordinance which prohibits peddling without a license, and provides that a license may issue on payment of a fee not exceeding $50, without fixing the time for which the license shall be granted, authorizes an unreasonable charge, and is invalid.—STATE V. GLAVIN, Conn., 34 Atl. Rep. 708.

174. MUNICIPAL CORPORATIONS—Ordinance.—Code, § 3799, empowering all towns "to make such by-laws, rules and regulations for the better government of the town, as they may deem necessary," does not authorize an ordinance making it "unlawful for any barkeeper, clerk or agent or any person whatever to keep open, or be or remain in, a bar-room or other place where spirituous or intoxicating liquors are sold, between the hours of 10 o'clock P. M. and 4 o'clock A. M." —STATE V. THOMAS, N. Car., 24 S. E. Rep. 535.

175. MUNICIPAL CORPORATION — Ordinance — Rapid Driving.—Under authority granted by the charter to pass an ordinance to prevent and punish immoderate driving upon the public streets of the city of Minneapolis, the council enacted an ordinance which prohibited driving upon the streets at a greater rate of speed than six miles an hour; no exceptions being made: Held, as to members of a salvage corps, organized under the provisions of Gen. Laws, 1895, ch. 178, § 1, and for the purposes therein prescribed, responding to an alarm of fire sent to their station from the headquarters of the city fire department, said prohibition was unreasonable and invalid.—STATE V. SHEPPARD, Minn., 67 N. W. Rep. 62.

176. MUNICIPAL CORPORATIONS—Ordinance—Licenses. —Where a person procures a license for the purpose of conducting a public dance in connection with a saloon, under an ordinance providing for the licensing of "public amusements," and conducts such dance for nearly a year without objection on the part of the city authorities, the city cannot claim that the license was invalid because it did not specify the kind of amusement and the particular place licensed as required by the ordinance.—PEARSON V. CITY OF SEATTLE, Wash., 44 Pac. Rep. 884.

177. MUNICIPAL CORPORATIONS—Repeal of Ordinance. Mill & V. Code, § 47, providing that "the repeal of a statute does not affect any right accrued, any duty imposed, any penalty incurred, under and by virtue of the statute repealed," applies only to the statutes of the State; and the repeal of a municipal ordinance under which a penalty has been incurred has the effect given it by the common law, and operates as a pardon of the offense, superseding the jurisdiction of the court in any suit pending to enforce such penalty.—MAYOR, ETC. OF RUTHERFORD V. SWINK, Tenn., 35 S. W. Rep. 554.

178. MUNICIPAL ORDINANCES—Review.—Where a municipal ordinance is attacked as unconstitutional because of alleged unreasonableness of rates fixed therein, the controversy is a constitutional question, and not an ordinary issue of fact, even though the reasonableness of such rates, in the operation and effect of the ordinance, cannot be decided from an inspection of the ordinance itself, but requires for its decision the determination and application of extrinsic facts.— CAPITOL CITY GAS CO. V. CITY OF DES MOINES, U. S. C. C. (Iowa), 72 Fed. Rep. 818.

179. NEGLIGENCE — Dangerous Premises—Injury to Licensee.—Where one goes on premises by implied permission, he does so at his own risk, assuming the responsibility of all risks incident to the place.—SETTOON V. TEXAS & P. R. CO., La., 19 South. Rep. 759.

180. NEGOTIABLE INSTRUMENTS — Notes — Attorney's Fees.—Notes given to A & M contained a provision for recovery of "attorney's fees, if placed in the hands of an attorney by A & M for collection:" Held, that the indorsee of such notes, who placed them in the hands of an attorney, and brought suit on them, could recover the attorney's fees.—CHICAGO COTTAGE ORGAN CO. V. WADDELL, Tex., 35 S. W. Rep. 408.

181. NEGOTIABLE INSTRUMENT — Consideration of Note.—The release by a creditor of a claim against an estate is a sufficient consideration to support a note given by the decedent's widow for the debt.—TAYLOR V. CLARK, Tenn., 35 S. W. Rep. 442.

182. NEGOTIABLE INSTRUMENTS—Fraud of Payee.—In an action by the indorsee of a note where plaintiff, anticipating the testimony of the defense, introduced evidence to show that the note was indorsed before maturity for value, it was competent for defendant to show that the note was procured by the payee by false and fraudulent representations, though unable to charge plaintiff directly with knowledge of such fraud.—OWENS V. SNELL, HEITSHU & WOODARD CO., Oreg., 44 Pac. Rep. 827.

183. NEGOTIABLE INSTRUMENTS—Fraudulent Transfer. —A note representing the payee's interest in a stock of goods which had been transferred with intent to defraud his creditors was placed in escrow. It was indorsed in blank by the payee, to avoid garnishment, and was afterwards transferred by a separate instrument to one who had full knowledge of the fraudulent intent of the makers and payee, and of the non-delivery of a note: Held, that the purchaser was not a *bona*

fide holder.—BLACKMAN v. HOUSSELS, Tex., 35 S. W. Rep. 511.

184. NEGOTIABLE INSTRUMENTS—Indorsement Before Delivery.—Where a negotiable promissory note, made payable to a particular person or order, is first indorsed by a third person, and then delivered to the payee, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time; and this may be shown by parol proof.—ROANOKE GROCERY & MILLING CO. v. WATKINS, W. Va., 24 S. E. Rep. 612.

185. NON-NEGOTIABLE NOTE.—The assignee of a note not negotiable can only recover from a remote assignor the consideration paid such assignor by his immediate assignee for such note.—GOFF v. MILLER, W. Va., 24 S. E. Rep. 643.

186. NEGOTIABLE NOTE-Ownership.—An action on a note executed to the order of, and indorsed in blank by, the maker, may be maintained against the maker by one who indorsed the note for him, though the note had not been paid by said indorser, and was obtained from the person beneficially interested therein merely for the purpose of suit.—BERNEY v. STEINER, Ala., 19 South. Rep. 806.

187. NEGOTIABLE NOTES—Bona Fide Holder.—There are circumstances which place the holder of paper in circulation upon inquiry, without direct notice of any infirmity of any title. The policy executed on the life of the deceased was a valid contract, and, as such, was assignable to the defendants, for the amount held due.—HAYS v. LEPEYRE, La., 19 South. Rep. 821.

188. PARENT AND CHILD—Emancipation of Minor—Wages.—Where an agreement of employment makes the wages payable to the employee, a minor, the father of the minor, by confirming and approving the agreement, releases, in favor of the minor, his right to the wages earned under the contract.—PARDEY v. AMERICAN SHIP WINDLASS CO., R. I., 34 Atl. Rep. 737.

189. PARTNERSHIP—Conversion of Trust Property.—Under Code, § 291, subsec. 2, authorizing arrest for the fraudulent misapplication of trust property, a partner who has only constructive knowledge of a firm trust is subject to arrest for joining in a firm assignment by which the trust property is conveyed to the assignee for other creditors.—DURHAM FERTILIZER CO. v. LITTLE, N. Car., 24 S. E. Rep. 664.

190. PRINCIPAL AND AGENT—Duties and Liabilities.—If an agent sells his own and his principal's goods in common, and collects enough to pay his principal, but not enough to pay both, and, as an act of his own, indulges the purchaser, he must pay his principal, and cannot apportion what he has collected between himself and his principal.—SIMMONS v. LOONEY, W. Va., 24 S. E. Rep. 677.

191. PRINCIPAL AND AGENT—Ratification.—Plaintiff consigned goods to defendants, with instructions not to sell below a certain price without first advising him. Defendants sold at a price lower than that named, and without consulting plaintiff, but notified him immediately after the sale. Plaintiff was absent from home when defendants' letter arrived, but, after his return, made no objection to the sale, until several months had elapsed: Held, that plaintiff's failure to disavow defendants' acts immediately on the learning of the facts of the sale was a ratification precluding recovery of damages therefor.—KENDALL v. EARL, Cal., 44 Pac. Rep. 791.

192. NATIONAL BANKS—False Entries—Presumption.—If a president or cashier makes a false entry in a report of the condition of the bank to the comptroller of the currency, the jury are authorized to presume from the false entry itself, in the absence of any explanation or of any other testimony, that he knew it to be false. This presumption results from the fact that it is the duty of the officer who verifies the report to know the condition of the bank, and, if the report is false, there is a *prima facie* presumption that he knew it.—UNITED STATES v. ALLIS, U. S. C. C. (Kan.), 73 Fed. Rep. 165.

193. PRINCIPAL AND SURETY—Appearance Bond.—The surety on an appearance bond is not released from liability because of the inexact language in the bond, dedescribing the offense; least of all when it contains the condition that the accused will not depart the court without leave.—STATE v. ARLEDGE, La., 19 South. Rep. 761.

194. PRINCIPAL AND SURETY—Clerk of Court.—The payment of money to the clerk in vacation is not equivalent to the payment of money into court, and if the clerk fails to return such money into court the sureties on his official bond cannot be held responsible for its loss.—STATE v. ENSLOW, W. Va., 24 S. E. Rep. 679.

195. PRINCIPAL AND SURETY — Parties — Obligors in Joint Instrument.—Rev. St. 1895, art. 1203, providing that any "principal obligor in any contract may be sued either alone or jointly with any other party who may be liable thereon," applies not only as between a principal and those whose liability is secondary, but also as between joint principals, and one principal obligor is not a necessary party to an action against his joint principal.—MILLER v. SULLIVAN, Tex., 35 S. W. Rep. 363.

196. PUBLIC LANDS — When Subject to Location.—Where claimants of land under a void patent appeal, without giving a *supersedeas* bond, from a decree in favor of the State declaring the patent void, the patent continues in existence and the land is "titled land," and not subject to location until such decree is made final by affirmance.—SANDERSON v. FAULK, Tex., 35 S. W. Rep. 409.

197. RAILROAD COMPANIES—Action for Stock Killed.—Where a railroad company leaves its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals getting upon the railroad track, it is the duty of the railroad company, through its agents, to use at least ordinary care to avoid unnecessary injury to the animals when found in the way of a train on the road.—KIRK v. NORFOLK & W. R. CO., W. Va., 24 S. E. Rep. 639.

198. RAILROAD COMPANIES—Failure to Erect Cattle Guards.—Where a contractor engaged in building a railroad pulled down fences and allowed them to remain down without constructing proper cattle guards, the railway company was liable for the damages caused thereby.—CHICAGO, R. I. & T. RY. CO. v. YARBROUGH, Tex., 35 S. W. Rep. 422.

199. RAILROAD COMPANY—Killing Stock.—Mill & V. Code, § 1298, subsec. 4, requiring every railroad company to keep a person on each locomotive on the lookout ahead, and to sound the alarm whistle and apply the brakes whenever any animal or other obstruction appears on the track, applies to a freight train running at full speed through the grounds of a station at which it does not stop.—MOBILE & O. R. CO. v. HOUSE, Tenn., 35 S. W. Rep. 561.

200. RAILROAD COMPANIES—Negligence—Highway.—The failure of a railroad company to remove a bank of earth on its right of way, consisting almost entirely of a natural hill through the base of which the bank was laid in a cut, and which obstructed the view of an approaching train from travelers on the highway, was not a failure to restore the highway to its former state of usefulness, as required by Rev. St., § 1836.—LEITCH v. CHICAGO & N. W. RY. CO., Wis., 67 N. W. Rep. 21.

201. RAILROAD COMPANY — Street Railways — Use of Streets Therefor.—The mere construction of a street railway does not impose on the street an additional servitude, so as to require therefor the condemnation of the rights of the abutting property owners in the street.—MERRICK v. INTRAMONTAINE R. CO., N. Car., 24 S. E. Rep. 667.

202. RAILROADS—Contributory Negligence.—The yard foreman of a terminal switching company operating over 40 miles of track and 70 switches, whose duty re-

quired him to aid in and superintend the switching, seeing none of the crew on the approaching switch train, went between the cars to make a coupling when they were three feet apart and still in motion, and fell over a pile of ashes on the track. The ashes were partially covered by snow and ice, and the day was dark and sleet was falling: Held, that the foreman was not, as a matter of law, guilty of contributory negligence.—KENNEDY V. LAKE SUPERIOR TERMINAL & TRANSFER RY. CO., Wis., 66 N. W. Rep. 1137.

203. RECEIVER.—A receiver is not liable for the loss of cattle merely because he allowed them to remain on the range, or for property burned merely because he failed to insure it; ordinary care is the test of his responsibility.—HAMM V. J. STONE & SONS LIVE STOCK CO., Tex., 35 S. W. Rep. 427.

204. RELEASE OF JOINT DEBTOR—Judgment.—An action was brought against two of three joint obligors in a bond, and the representatives of the third, who had died. One of the defendants defaulted, but no judgment was entered against him. The others defended, and separate judgments in their favor were entered on different days. After the time for suing out a writ of error on the first judgment, which was against one of the surviving obligors, had expired, the plaintiff sued out a writ of error on the other judgment against the representatives of the deceased obligor: Held, that the failure of the plaintiff to sue out a writ of error on the first judgment within the time limited having made that judgment final, it operated as a release of the defendant against whom it was taken, and hence, within the rule that a release of one joint obligor is a release of all, it operated as a release of the defendants in the other judgment, and that the writ of error should be dismissed.—CONNECTICUT FIRE INS. CO. V. OLDENDORFF, U. S. C. C. of App., 73 Fed. Rep. 88.

205. RELEASE AND DISCHARGE—Joint Debtors—Judgment.—Under statutory provisions for the discharge of one of the joint debtors without releasing the others from their ratable proportions of the debt, 2 How. Ann. St., § 7784, permits the clerk of the court to discharge a judgment, as to the released debtor, upon filing the proper evidence: Held, that such filing and discharge are not a prerequisite to a release, and that a release may be shown on the trial of an action brought to enforce the judgment.—BEEKMAN V. SYLVESTER, Mich., 66 N. W. Rep. 1093.

206. REMOVAL OF CAUSES—Diverse Citizenship.—An action by a county school board against an alien to cancel, for the benefit of the public schools, a deed to certain swamp lands, made by the county commissioner, was brought, by permission of a statute, in the name of the State of Missouri. The ground alleged was that the deed was invalid for want of a seal, and the county was made a defendant because it refused to join as a complainant: Held, that both the State and the county were merely nominal parties, and the alien defendant was entitled to remove the cause.—STATE OF MISSOURI, PUBLIC SCHOOLS OF CAPE GIRARDEAU COUNTY V. ALT, U. S. C. C. (Mo.), 73 Fed. Rep. 302.

207. REMOVAL OF CAUSES—Local Prejudice.—An application for the removal of a cause from a State to a federal court on the ground of local prejudice, under the act of Congress of March 3, 1887 (amended August 13, 1888), should not be granted without giving to the plaintiff notice and an opportunity to be heard, though the court has power to grant the application *ex parte*.—HERNDON V. SOUTHERN R. CO., U. S. C. C. (N. Car.), 73 Fed. Rep. 307.

208. REMOVAL OF CAUSES—Separable Controversy.—One W, a citizen of New Jersey, brought a suit in a court of that State against a railway company incorporated by that State, and against its officers and directors, to have the railway company declared insolvent and a receiver appointed under a State statute. About the same time one V, a citizen of New York, and trustee under a mortgage of the railroad, took possession of the road under the provisions of the mortgage. Thereupon he was made a party to a suit brought by W, and removed the cause to the federal court on the ground that there was a separable controversy between complainant and himself. Complainant moved to remand: Held, that there was no such separable controversy, and that the suit should be remanded.—WATSON V. ASBURY PARK & B. ST. RY. CO., U. S. C. C. (N. J.), 73 Fed. Rep. 1.

209. RES JUDICATA—Criminal and Civil Suits.—The acquittal of a defendant under an indictment for making false and fraudulent returns, as postmaster, of the business done at his office for the purpose of increasing his compensation, is not a bar to an action by the United States upon the bond of such defendant, as postmaster, to recover the amount found due to the government from defendant, upon the adjustment of his accounts, as shown by the same returns.—UNITED STATES V. JAEDICKE, U. S. D. C. (Kan.), 73 Fed. Rep. 100.

210. SALE—Conditional Sales of Personalty.—Where a conditional sale of personalty is made, the title to remain in the seller until payment of notes given for the purchase money, a surrender of such notes and an acceptance of notes of a third person in their stead, with a proviso that the purchaser shall not be released from liability, does not divest the seller of his claim on the property.—HOLLENBURG MUSIC CO. V. MORRIS, Tex., 35 S. W. Rep. 396.

211. SALE OF PERSONALTY—Surrender.—The buyer of personal property may peaceably surrender possession to a third person, claimant thereof; but if he does so in an action between him and the seller, in order to sustain a claim on his part for damages for the loss of the property, he must prove that the third person had a title thereto, valid and paramount to that acquired by the buyer from the seller.—HANNA V. BUCKLEY, Neb., 66 N. W. Rep. 1122.

212. SALE — What Constitutes. — An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale, with an option to rescind, and not a contract of brokerage.—HOUCK V. LINN, Neb., 66 N. W. Rep. 1103.

213. SALE—Warranty.—To constitute a warranty it is not necessary that the word "warrant" should be used; it is sufficient if the language used by the vendor amounts to an undertaking or assertion on his part that the thing sold is as represented.—UNLAND V. GARTON, Neb., 66 N. W. Rep. 1130.

214. SALES—Mistake of Buyer.—That the buyer, in ordering goods by letter, ordered by mistake a larger quantity than desired, the goods to be put up in packages with his advertisement thereon, does not entitle him to refuse to accept all of the goods when delivered, the seller having been unaware of the mistake.—J. A. COATES & SONS V. BUCK, Wis., 67 N. W. Rep. 23.

215. SCHOOLS — Board of Education — Powers.— The board of education of a school district, composed of the president of the board of education and two commissioners, is a public corporation, created by statute (Code, § 7, ch. 45), with functions of a public nature expressly given, and having no other; and therefore it can exercise no power not expressly conferred or fairly arising by necessary implication, and it can exercise its functions in no other mode than in that prescribed or authorized by the statute.—HONAKER V. BOARD OF EDUCATION, W. Va., 24 S. E. Rep. 544.

216. SET-OFF.—In an action upon a *supersedeas* bond, against the principal and sureties, thereon, a legal claim from the plaintiff to such principal may be pleaded as a set-off.—VAN ETTEN V. KOSTERS, Neb., 66 N. W. Rep. 1106.

217. SET-OFF—Receivers of Insolvent Banks.—The bank A, at the time of its failure, was indebted to the bank B, which subsequently failed; the trustee of the bank A having at the time, on deposit with the bank B, funds of the trust estate: Held, that the receiver of the bank B was not entitled to set off against the indebtedness due the trustee of the bank A on the de-

posits, the indebtedness due the bank B from the bank A; nor was the trustee of the bank A entitled to set off, against the *pro rata* share of the bank B in the funds of the bank A, the indebtedness due from the bank B on account of the deposits; but each was only entitled to receive from the other a *pro rata* share with the other creditors.—AKIN V. WILLIAMSON, Tenn., 35 S. W. Rep. 569.

218. SLANDER—Words not Actionable.—A statement by defendant in a public speech that plaintiff, a member of congress, "had signed the 'alliance demands' and then went to Washington as congressman, and repudiated those demands," charges neither a crime nor a dereliction of official duty, and is not actionable *per se*.—CRAWFORD V. BARNES, N. Car., 24 S. E. Rep. 670.

219. SPECIFIC PERFORMANCE — Contract.—Where a contract for an unexpired term of years imposes on complainant the rendition of continuous mechanical services demanding the highest degree of skill, and on defendant the duty of maintaining costly machinery, and the daily use of cars moved by electricity on the line of its railway, a court of equity will not decree a specific performance of the contract.—ELECTRIC LIGHTING CO. OF MOBILE V. MOBILE & S. H. RY. CO., Ala., 19 South. Rep. 721.

220. SPECIFIC PERFORMANCE—Contract for Sale of Land.—A bill for the specific enforcement of a contract to convey lands is not demurrable because it fails to show whether or not a note which was to be executed by the purchaser for a part of the price was ever executed, or when such purchase money was payable, where the contract set out shows the purchase price and the rate of interest it is to bear until paid, and it is alleged that the original parties to the contract are both dead, and the complainant has no knowledge as to such omitted facts. Where a written contract for the sale of land does not fix the time for the payment of the purchase money, the legal construction is that it is payable presently.—PECK V. ASHURST, Ala., 19 South. Rep. 781.

221. SUBROGATION—Liens.—A lender of money to a debtor, to be used in paying claims for which the holders might have secured liens, in the absence of contract therefor, is not entitled to be subrogated to such liens.—MELLON V. MORRISTOWN & C. G. R. CO., Tenn., 35 S. W. Rep. 464.

222. SUBROGATION — Dower — Priority. — Where the owner of a tract of land has allowed the same to be incumbered by deeds of trust and judgment liens, and while it is in that condition he intermarries, and then he and his wife make a conveyance of the land to a third party, in which she did not effectively join, being then an infant, who, out of the purchase money, pays off and discharges said liens in order to relieve the property therefrom, he is entitled to be subrogated to the rights of the parties holding said liens, and such liens are paramount to said wife's right of dower on the decease of her husband.—BLAIR V. MOUNTS, W. Va., 24 S. E. Rep. 620.

223. TAXATION.—Under act Feb. 17, 1885, § 84 (Code 1886, § 567), requiring the tax collector to append to the docket delivered to the probate judge an oath to the effect that he has in each case made "diligent search for personal property of the parties against whom the taxes are respectively assessed," does not invalidate a tax sale where the real estate in question was assessed to "owner unknown."—CARY V. HOLMES, Ala., 19 South. Rep. 723.

224. TAXATION.—The imposition of taxes and the law directing the mode of assessment and collection are the exercise of legislative power, to be exercised in conformity with the requirements of the constitution by general law.—STATE V. SOUTH PENN OIL CO., W. Va., 24 S. E. Rep. 688.

225. TAXATION—Ownership of Taxable Property.—Where one owning a franchise for the erection of a bridge employed a bridge company to construct the same under a contract providing that the bridge company should advance the money and perform all the services necessary in the construction and maintenance of the bridge, in consideration whereof the bridge company should have forever exclusive possession and use of the bridge, such exclusive possession to be in liquidation of all sums advanced and services performed under the agreement, the grant of exclusive possession operates as an absolute conveyance, vesting the ownership of the bridge in the bridge company.—STATE V. MISSISSIPPI RIVER BRIDGE CO., Mo., 35 S. W. Rep. 592.

226. TAX SALE—Invalid Tax Deed.—While the holder of a certificate of purchase at a tax sale may foreclose his lien when the tax deed issued pursuant thereto is invalid by reason of an irregularity in the proceedings leading up to such sale, this rule cannot be invoked when, in his petition, such purchaser alleges that the treasurer made the sale to him without authority of law, and without any jurisdiction in the premises.—LEDWICH V. CONNELL, Neb., 66 N. W. Rep. 1108.

227. TRESPASS—County Surveys.—The location by the county surveyor of the section lines under act 1890, ch. 35, which makes the survey presumptively correct, only makes such location *prima facie* evidence against the landowners. County officers trespassing upon land in the attempt to locate a section line highway on a line other than its proper location are personally liable for the trespass.—WEBSTER V. WHITE, S. Dak., 66 N. W. Rep. 1145.

228. TRIAL—Demurrer to Evidence.—A failure to incorporate the evidence demurred to, and, in unequivocal terms, to admit its entire truthfulness, with all legitimate inferences and deductions to be drawn therefrom, renders a demurrer to the evidence fatally defective.—ILLINOIS CENT. R. CO. V. BROWN, Tenn., 35 S. W. Rep. 560.

229. TRIAL—Setting Aside Verdict—Evidence.—The federal courts have no power to set aside a verdict because against the weight of evidence, however decided that weight may be, if any evidence has been given which would have rendered it improper for the court to direct a verdict.—SPIRO V. FELTON, U. S. C. C. (Tenn.), 73 Fed. Rep. 91.

230. TRIAL—Witness—Refreshing Recollection.—The rule allowing a witness to refresh his recollection by writings or memoranda is limited to matter reduced to writing contemporaneously with the transaction to which it relates, or so shortly afterwards that the facts were still fresh in his mind, so that he may with safety be allowed to refer to them to remove any subsequent weakening of memory. Held, therefore, that statements taken down as testimony before the grand jury, over four months after the occurrences to which they relate, could not be used for that purpose.—PUTNAM V. UNITED STATES, U. S. S. C., 16 S. C. Rep. 923.

231. TRUST AND TRUSTEE—Creditors—Fraud of Trustee.—One who borrows money for the use of another, giving his own notes therefor, becomes a creditor of the beneficiary for the amount, and where, in such case, after the debtor's death, the trustee of his estate, by false representations as to the insolvency of such estate, induces the creditor to pay a sum of money, and to assign his claim against the estate, in consideration of being protected from further liability on the notes given for such borrowed money, the creditor may, on discovery of the fraud, and that the estate is solvent (provided the trust on which it is held is for the benefit of creditors), repudiate the transaction, and recover from the estate the amount of which it was thereby defrauded.—BURLING V. NEWLANDS, Cal., 44 Pac. Rep. 810.

232. TRUST AND TRUSTEE—Usurious Note.—In a bill to recover of a trustee for creditors because of an alleged violation of his bond in ignoring the note of complainants as a legal demand against his trust, and his refusal to pay a *pro rata* thereon, it appeared that the trust conveyance described complainant's note as: "P, L & Co. Note, $542.68. Some credits to go on above note, but the exact amount is not known." It also ap-

peared that the note on its face provided for the payment of usurious interest: Held, that the trustee's refusal to pay a *pro rata* on the note was not a violation of his bond.—POWERS v. BIBEE, Tenn., 35 S. W. Rep. 448.

233. TRUST ESTATES—Equitable Jurisdiction.—A court has no power to authorize a sale of land, and a reinvestment of the proceeds, where the land is held under a deed of trust creating contingent remainders, which renders it impossible for the court to know that all interests are before it.—SMITH v. SMITH, N. Car., 24 S. E. Rep. 666.

234. TRUSTEES—Improvement of Trust Property.—Where a trustee in good faith expends his own funds in improving the property of the *cestui que trust*, and the property is enhanced in value by such improvements to the extent of the expense thereof, such trustee is entitled to be reimbursed such expense out of the increased rents occasioned by such improvements.—DICKEL v. SMITH, W. Va., 24 S. E. Rep. 564.

235. USURY—Commissions—Principal.—Where a principal furnishes money to an agent to loan, under a general agreement that the agent is to guaranty repayment of the money at a certain rate of interest, and shall look to the borrower for this compensation, a commission exacted from a borrower by the agent will be charged against the principal in determining whether the loan is usurious.—TEXAS LOAN AGENCY v. HUNTER, Tex., 35 S. W. Rep. 399.

236. USURY—New Promise.—Though a note given for a loan of money be usurious, and hence void, under the constitution, both as to principal and interest, there is a moral duty to pay the debt; and the parties may cancel the old contract, purge the consideration of usury, and make it the basis of a new obligation which will bind the borrower to repay the money actually received, with interest at the legal rate.—GARVIN v. LINTON, Ark., 35 S. W. Rep. 430.

237. VENDOR AND PURCHASER—Auction Sale of Lands—Crops.—Neither the notice of an auction sale of land, nor the deed made to purchaser, made any reference to crops or rents. The auctioneer modified his statement that possession would be given at once, by stating that certain persons (referring to renters) had corn on some of the land, and that would have to be removed or fed, and the purchaser could not get possession of that till the crops were cribbed or fed. The corn was then growing, and the rent, which was a share of the corn, was not due till some time after that: Held, that there was no reservation of the landlord's share of the corn, but that the right thereto passed to the purchaser.—HUDSON v. FULLER, Tenn., 35 S. W. Rep. 575.

238. VENDOR AND PURCHASER—Vendor's Lien.—A vendor's lien (as distinguished from a lien reserved by contract) can only be enforced where there is a fixed sum of money due from the vendee to the vendor for the land conveyed, and the right to such lien does not exist where the land and other property are sold for a sum in gross.—GRIFFIN v. BYRD, Miss., 19 South. Rep. 717.

239. WAREHOUSEMEN—Storage by Railroad.—Goods shipped over defendant's railroad, the consignee of which could not be found, or refused to take the same, were stored by defendant in plaintiff's warehouse, laintiff paying the freight, and giving non-negotiable receipts, reciting, in most cases, the receipt of the goods from defendant, the name of the consignee and the amount of freight charges paid by plaintiff to defendant: Held, that the receipts did not, as matter of law, make defendant liable for the storage charges, but that it could be shown by the conduct of the parties that the goods were stored for and on account of the owner.—PROVIDENCE WAREHOUSE CO. v. PROVIDENCE & W. R. CO., R. I., 34 Atl. Rep. 739.

240. WATERS — Riparian Owners.—The common-law doctrine of the rights of riparian owners to the waters of natural streams, being inapplicable to the requirement of the landowners of Wyoming, is not in force in that State.—MOYER v. PRESTON, Wyo., 44 Pac. Rep. 845.

241. WILLS—Estates in Trust.—A devise to an executor in trust for testator's children, authorizing the trustee to manage the trust estate for the best interests of the beneficiaries, and to sell the same, or any part thereof, at any time, and on such terms as he may deem best, is a personal trust, which terminates on the trustee's death, vesting the estate in the beneficiaries as tenants in common.—BAKER v. MCADEN, N. Car., 24 S. E. Rep. 531.

242. WILLS—Defeasible Fee.—A testator devised lands to two of his daughters, "to them and their heirs, forever," but, in a subseqnent clause, provided that, if "either one" of such daughters "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between, the rest of my children and the children of those who are dead:" Held, that the daughters took a defeasible fee.—CROZIER v. CUNDALL, Ky., 35 S. W. Rep. 546.

243. WILLS — Legacies.—Where a will provides that executors shall not be required to pay legacies "until such time as it may be practicable to do so, having regard to beneficial management of my said estate," the legacies become due, without regard to the provision, at the end of one year after the testator's death, by Civ. Code, § 1368, and draw interest thereafter by section 1369.—WILLIAM'S ESTATE, Cal., 44 Pac. Rep. 808.

244. WILLS—Loss.—Under Rev. St. § 3791, authorizing the county court to take proof of the execution and validity of a will lost or destroyed by accident or design, and to establish the same, the legatees, devisees, and heirs are all parties.—IN RE VALENTINE'S WILL, Wis., 67 N. W. Rep. 12.

245. WILLS—Parties — Personal Estate.—Where a bequest is left in equal shares to certain persons, each of whom is described by name and by the nature of his kinship to testator, the presumption, in the absence of anything showing a contrary intention, is that such bequest is a gift in severalty to each of the legatees, not a gift to them as a class, and hence the share of any such legatee lapses on his dying without issue before testator.—ROCKWELL v. BRADSHAW, Conn., 34 Atl. Rep. 758.

246. WITNESS — Credibility — Contradictory Statements.—The rule that statements of the witness, out of court, contradictory of his testimony, cannot be proved unless he is first afforded the opportunity of denial, admission, or explanation, is enforced, whether the imputed contradictions are offered to impeach the credit of the witness, or to show his malice to the accused.—STATE v. GOODBIER, La., 19 South. Rep. 755.

247. WITNESS—Criminal Prosecution—Fees.—One who is committed to custody by an examining magistrate in a criminal proceeding for failure to give security for his appearance as a witness for the prosecution, if such failure is not due to contumacy, or to his bad character, but solely to inability through no fault on part, will be considered as in attendance on the court, and entitled to his *per diem* as a witness, for the term of his detention.—HALL v. COMMISSIONERS OF SOMERSET COUNTY, Md., 34 Atl. Rep. 771.

248. WITNESS—Impeachment.—Where, in a prosecution for slandering prosecutrix by accusing her of unchastity, she goes upon the stand as a witness for the State, defendant may show her reputation for morality as of the time of the trial, to discredit her testimony.—STATE v. SPURLING, N. Car., 24 S. E. Rep. 533.

249. WITNESS — Transactions with Decedent.—In a suit brought by a creditor to set aside a deed for fraud as to his debt, the grantee is not incompetent to testify in support of his title and the good faith of his conveyance for the reason that it necessarily involves transactions and communications had with a deceased grantor, whose personal representatives or heirs are made parties defendant to the suit.—FARMERS' BANK OF FAIRMONT v. GOULD, W. Va., 24 S. E. Rep. 547.